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Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators-A Due Process Analysis

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NOTES

CONSTITUTIONAL IMPLICATIONS OF THE INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS—A DUE PROCESS ANALYSIS

INTRODUCTION

Public outcry over ever increasing incidents of sexual violence encouraged a number of state legislatures to enact laws requiring the involuntary commitment of sexual predators.[1] Although sexually violent predator statutes date back at least fifty-five years, many states repealed their sexually violent predator statutes in the 1970s "as concern shifted from treating and rehabilitating individuals to prosecution and punishment of those individuals."[2] Modern sexually violent predator statutes differ substantially from the earlier treatment-oriented laws, because they mandate civil commitment for treatment and confinement subsequent to the completion of a criminal sentence. Currently, sixteen jurisdictions have sexually violent predator statutes.[3] These

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1 *See* Claudine M. Leone, *New Jersey Assembly Bill 155, A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 SETON HALL LEGIS. J. 890 (1994) (describing public outrage over and legislative response to the release of Donald Chapman); Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277 (1992) (referring to the public outcry in Washington State that led to the enactment of its sexually violent predator statute); Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 KAN. L. REV. 887 (1994) (detailing the creation of Kansas' Task Force on Sex Offenders by a couple whose daughter was raped and murdered by a released offender with a history of violent sexual offenses).

2 McCaffrey, *supra* note 1, at 889.

3 California, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, Oregon, Tennessee, Utah, Virginia, Washington, and the District of Columbia currently have sexual predator laws. *See* CAL. WELF. & INST. CODE § 6250 (West 1994 & Supp. 1997); COLO. REV. STAT. §§ 16-13-201 to -216 (1986 & Supp. 1996); CONN. GEN. STAT. ANN. §§ 17a-566 to -567 (West 1992); D.C. CODE ANN. §§ 22-3501 to -3511 (1989 & Supp. 1990); ILL. COMP. STAT. 205/1.01 to 12 (West 1992); KAN. STAT. ANN. §§ 59-2901 to -2941 (1995); MASS. ANN. LAWS ch. 123A, §§ 1-9 (Law. Co-op. 1989 & Supp. 1996); MINN. STAT. ANN. §§ 253B.18 (1994 & Supp. 1997); NEB. REV. STAT. §§ 29-2922 to 2936 (1995); N.J. STAT. ANN. §§ 2C:47-1 to 2C:47-8 (West 1995 & Supp. 1996); TENN. CODE ANN. §§ 33-6-301 to 305 (1984 & Supp. 1996); UTAH CODE ANN. §§ 77-16-1 to -5 (1995); VA. CODE ANN. §§ 19.2-300 to -302 (1990); WASH. REV. CODE ANN. §§ 71.06.005 to -.270 (1992). Although only sixteen jurisdictions today have sexually violent predator laws, in 1960, twenty-six states and the District of Columbia had sexual psychopath statutes. *See* Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: the Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 215 (1991); *see also* Alan H. Swanson, Comment, *Sexual Psychopath Statutes: Summary and Analy-*

laws vary in composition, and, as evidenced by the articles opposing their enactment, they certainly have not yet received universal acceptance.[4]

Opponents argue that the penal system, not the civil should handle the commitment of sexually violent predators.[5] This argument reflects one controversy over these statutes—whether they are truly civil in nature.[6] But the issues surrounding sexually violent predator statutes extend far beyond a distinction between the civil or criminal nature of the laws. The statutes also implicate due process,[7] double jeopardy,[8] and ex post facto[9] concerns. Opponents attest that the statutes are criminal, and therefore, violate ex post facto and double jeopardy prohibitions.[10] They also argue that the sexual predator statutes violate due process guarantees and court-created doctrines because commitment relies on unreliable psychiatric predictions of future dangerousness,[11] as well as mental conditions that retain no fixed meaning to psychiatric professionals.[12]

Proponents of sexual predator statutes, on the other hand, support the civil commitment of sexual predators on both moral and practical grounds.[13] From a moral perspective, when discussing violent sexual offenses, intellectual arguments easily give way to emotional ones. From a pragmatic perspective, proponents focus on sexual assault as the product of mental illness and, consequently, support institutionalizing sexual offenders indefinitely for treatment.[14]

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sis, 51 J. CRIM. L. & CRIMINOLOGY 215, 228-35 (1960). Legislatures in Alaska, Florida, Louisiana, Michigan, Mississippi, New York, Texas, and Vermont introduced legislation proposing involuntary commitment schemes for sexual predators in 1995. *See* H.R. 33, 19th Leg., 1st Sess., 1995 Alaska; S. 56, Reg. Sess., 1995 Fla.; H.R. 1602, Reg. Sess., 1995 La.; H.R. 5245, 88th Leg., Reg. Sess., 1995 Mich.; H.R. 114, Reg. Sess., 1995 Miss.; S. 2734, 218th Gen. Ass., 1st Reg. Sess., 1995 N.Y.; H.R. 595, 74th Reg. Sess., 1995 Tex.; S. 9, Biennial Sess., 1995 Vt. In January, 1995, Hawaii's legislature introduced a similar scheme, but withdrew it two weeks later. *See* H.R. 1010, 18th Leg., 1995 Haw.

4 *See* John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755 (1992); *see also* James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849 (1992).

5 *See* Julie Shapiro, *Sources of Security*, 15 U. PUGET SOUND L. REV. 843 (1992).

6 *See infra* Part II.A.1.b and note 49; *see also* Timothy Michael Blood, *Proceedings Under Washington's New Statutory Scheme Providing for the Indefinite Involuntary Commitment of Sexually Violent Predators are Civil, Not Criminal, In Nature*, 15 U. PUGET SOUND L. REV. 855 (1992).

7 *See* Young v. Weston, 898 F. Supp. 744, 748-51 (W.D. Wash. 1995).

8 *See id.* at 753-54.

9 *See id.* at 751-53.

10 *See* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 718 (1992).

11 *See* Gleb, *supra* note 3, at 222-28.

12 *See* La Fond, *supra* note 4, at 770-79.

13 *See* Brooks, *supra* note 10.

14 *See* BARBARA K. SCHWARTZ & HENRY R. CELLINI, THE SEX OFFENDER: CORRECTIONS, TREATMENT AND LEGAL PRACTICE 2-2 (1995).

Pursuant to the dictates of *Foucha v. Louisiana*,[15] a case in which the Supreme Court upheld confinement of insanity acquitees based on dangerousness and mental illness, proponents argue that the sexual predator statutes survive due process challenges similar to any other civil commitment scheme.[16] If one classifies the sexual predator statutes as civil, double jeopardy and ex post facto concerns evaporate into a cloud of constitutionally permissible legislation.[17] Advocates further criticize opponents for relying on psychiatric, rather than legal, definitions of mental illness as grounds to invalidate the statutes.[18]

This Note attempts to uncover the constitutional implications of sexually violent predator laws as dictated by the Due Process Clause of the Constitution.[19] Although extremely relevant issues, this Note does not attempt to resolve the double jeopardy or ex post facto issues.[20] Instead, this Note explores whether the involuntary commitment of sexual predators violates the substantive due process rights of a class of prisoners that society views as less than human.

Part II sets forth the constitutional limitations on the state's power to incapacitate dangerous persons by analyzing Supreme Court decisions involving involuntary commitment statutes. It then explores the background of sexually violent predator statutes, the class of persons they effect, and the legal consequences of civil commitment by focusing on the statutes promulgated by Washington State, Minnesota, and Wisconsin. The federal courts have not yet heard the substantive due process argument as applied to the Minnesota and Wisconsin statutes, although a federal district court recently held Washington's sexually violent predator law unconstitutional.[21] This Note will analyze whether Minnesota's statute will be upheld on a due process challenge in the federal courts and whether Washington's statute will be upheld in the Ninth Circuit and ultimately in the

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15 504 U.S. 71 (1992).

16 *See id.*

17 *In re* Young, 857 P.2d 989 (Wash. 1993) (en banc).

18 *See* Gleb, *supra* note 3.

19 U.S. CONST. amend. XIV, § 1.

20 Although resolution of the double jeopardy and ex post facto challenges depend entirely upon defining these statutes as civil, the civil—criminal distinction is a collateral issue when analyzing the substantive due process implications of the statutes. *See* discussion *infra* Part II.A.1.b and note 49.

21 Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995). The Eighth Circuit held that "Minnesota's civil commitment statutes are constitutional." Bailey v. Gardebring, 940 F.2d 1150, 1153 (8th Cir. 1991). The court specifically determined that the construction of the statute by the Supreme Court of Minnesota was not constitutionally defective. The court did not rule on any substantive due process implications of the statute. Instead, the court determined the statute's constitutionality in the context of whether the statute requires the state to discharge a civil committee before transferring the committee to the custody of the Department of Corrections. *See id.*

Supreme Court.[22] This Note will also consider whether the legitimacy of the state's power depends on legislative definitions of mental illness.[23] This Note will concentrate on these issues and search for answers in light of the Supreme Court's recent decisions concerning involuntary commitment.

Part III analyzes the extent to which the state can incapacitate sexually violent criminals without violating the Due Process Clause. It also explores whether the modern predator laws fit within court-constructed rules that enforce the constitutional rights of prisoners. Finally, Part IV explains why these recent laws, modeled after the state of Washington's legislation, do not violate the Due Process Clause. It also discusses why the due process standards of involuntary commitment, as set forth by the Supreme Court, become unclear as constitutional law intersects with legal categories of mental illness.

II
BACKGROUND

A. Constitutional Limitations on the State's Power to Incapacitate Dangerous Persons

Although the Due Process Clause of the Fourteenth Amendment requires that no person be "deprived of life, liberty, or property without due process of law,"[24] the Constitution does not explicitly dictate the limits of its doctrine. Instead, state legislatures must adhere to court-constructed guidelines in order to insure that their laws fit within a constitutionally permissible framework. Unfortunately, these court-constructed rules dim upon intersection with statutory law.

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22 On March 1, 1996, the Kansas Supreme Court ruled that the Kansas Sexually Violent Predator Act violated substantive due process, although it did not reach the double jeopardy and ex post facto implications of the Act. Matter of Care and Treatment of Hendricks, 912 P.2d 129 (Kan. 1996), *stay granted*, Kansas v. Hendricks, 116 S. Ct. 1540, *cert. granted*, 116 S. Ct. 2522. On December 10, 1996, the United States Supreme Court heard oral arguments in the case in order to consider the constitutionality of the Kansas Sexually Violent Predator Act. The Court is expected to issue its opinion in the summer of 1997.

23 A Tennessee law classifies sex offenders as mentally ill persons—

> "Sex offenders constitute a species of mentally ill persons in the eyes of the general assembly, and where this tendency is pronounced, they should have the same care and custody as mentally ill persons generally, and such persons should be given continued care and treatment so long as their release would constitute a threat to them or to the general public."

TENN. CODE ANN. § 33-6-302 (1995). The Sixth Circuit found the statute clearly labels convicted sex offenders, but it only recommends and does not mandate involuntary treatment. *See* Dean v. McWherter, 70 F.3d 43, 44 (6th Cir. 1995). Although the statute stigmatizes sex offenders' reputations and diminishes employment opportunities, the court found that the statute does not deprive petitioners of due process. *See id.* at 46. Although *Dean* does not deal specifically with whether sexual offenders are mentally ill, the court accepted the classification as valid. *See id.* at 44-45.

24 U.S. CONST. amend. XIV.

1. *Supreme Court Decisions Concerning Civil Commitment Schemes*

The Supreme Court has continually upheld civil commitment schemes on various constitutional bases, although few cases specifically address substantive due process concerns. The Court repeatedly holds that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[25] Adherence to substantive due process guarantees insures that the government will not engage in conduct that "shocks the conscience"[26] or interferes with rights "implicit in the concept of ordered liberty."[27] The Supreme Court has insisted that a liberty interest be "fundamental, (a concept that, in isolation, is hard to objectify),"[28] as well as "an interest traditionally protected by our society."[29]

Due to the "fundamental nature" of an individual's interest in liberty,[30] the state must present compelling interests in order to legitimately incapacitate an individual.[31] Under this analysis, the state's scheme must pass the Court's strict scrutiny test: "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[32] The courts apply strict scrutiny when the challenged legislation involves a fundamental right; however, when the legislation involves a lesser right, then the state must only prove a "rational basis" for the challenged law.[33] Because of the importance of an individual's right to liberty "deeply rooted in this Nation's history and tradition,"[34] civil commitment schemes must pass the Court's strict scrutiny test.[35]

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25 Addington v. Texas, 441 U.S. 418, 425 (1979).

26 Rochin v. California, 342 U.S. 165, 172 (1952).

27 Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

28 Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

29 *Id.*

30 United States v. Salerno, 481 U.S. 739, 750 (1987).

31 *See id.*

32 Roe v. Wade, 410 U.S. 113, 155 (1973).

33 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

34 Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 304 (1990).

35 The majority in *Foucha v. Louisiana*, 504 U.S. 71 (1991), applied the strict scrutiny test to the Louisiana statute when it required carefully limited circumstances and legitimate and compelling government interests. *See id.* at 81. In his dissent in *Foucha v. Louisiana*, 504 U.S. 71, 102 (1992) (Thomas, J., dissenting), Justice Thomas argued that "[t]o the extent the Court invalidates the Louisiana scheme on the ground that it violates some general substantive due process right to 'freedom from bodily restraint' that triggers strict scrutiny, it is wrong—and dangerously so." *Id.* at 117. Justice Thomas agreed that freedom from involuntary confinement lies at the heart of liberty protected by the Due Process Clause, but he disagreed with the Court's inclination to equate liberty interest and fundamental right. *See id.*

a. Baxstrom v. Herold—*Civil Commitment Subsequent to Penal Sentence*

Baxstrom v. Herold[36] introduced the Supreme Court's position on civil commitment subsequent to a criminal sentence. In *Baxstrom*, a prison physician certified Johnnie Baxstrom as insane while serving his criminal sentence.[37] Baxstrom, having been convicted previously of second degree assault and sentenced to a penal term in a New York state prison, was transferred to Dannemora State Hospital, a penal institution used to confine and care for male prisoners declared mentally ill while serving a criminal sentence.[38] Prior to the termination of Baxstrom's penal sentence, the director of Dannemora filed a petition requesting Baxstrom's civil commitment.[39] At a hearing on the petition, two examining physicians declared Baxstrom to be mentally ill and in need of institutional care.[40] On the day Baxstrom's penal sentence expired, the Department of Mental Hygiene gained custody of Baxstrom, although the Department determined Baxstrom unsuitable for care in a civil hospital.[41]

Baxstrom sought a writ of habeas corpus in state court. At the hearing, an independent psychiatrist attested to Baxstrom's continuing mental illness, and the court dismissed the writ.[42] Baxstrom again applied for a writ of habeas corpus, which was likewise dismissed because he failed to produce psychiatric evidence to disprove the testimony from the prior hearing.[43] The Appellate Division affirmed the dismissal of the writ without opinion.[44]

The Supreme Court granted certiorari and held that Baxstrom

> was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.[45]

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36 383 U.S. 107 (1966).

37 *See id.* at 108.

38 *See id.*

39 *See id.*

40 *See id.*

41 *See id.* at 109.

42 *See id.*

43 *See id.* According to the Court, Baxstrom's inability to produce adequate testimony was "due to his indigence and incarceration." *Id.*

44 *See* People *ex rel.* Baxstrom v. Herold, 251 N.Y.S.2d 938 (App. Div.).

45 Baxstrom v. Herold, 383 U.S. 107, 110 (1966).

In resolving the equal protection challenge, the Court specifically held that "[f]or purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[46] In subsequent cases the Court consistently interpreted *Baxstrom* as requiring that "a convicted criminal who allegedly was mentally ill [is] entitled to release at the end of his term unless the State commit[s] him in a civil proceeding."[47] Simply, *Baxstrom* authorizes the civil commitment of criminals who complete their statutorily required criminal sentences.[48] Based on this broad, albeit accepted, reading of the *Baxstrom* holding, the Court essentially paved the way for the commitment of sexually violent predators both in lieu of and subsequent to completion of a criminal sentence.[49]

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46 *Id.* at 111-12.

47 Foucha v. Louisiana, 504 U.S. 71, 79 (1992). The Court has since interpreted *Baxstrom* to be applicable in other contexts as well, rather than reading the language in line with the specific holding of the case. Therefore, the *Foucha* Court would uphold involuntary civil commitment, which afforded adequate procedural and substantive due process protection, subsequent to a penal sentence. Conversely, in Justice Thomas's dissent, he stated that "[i]f Foucha had been convicted of the crimes with which he was charged and sentenced to the statutory maximum of 32 years in prison, the State would not be entitled to extend his sentence at the end of that period. To do so would obviously violate the prohibition on ex post facto laws." *Foucha*, 504 U.S. at 122 (Thomas, J., dissenting) (citations omitted). Although Thomas argued that the State could continue to confine dangerous insanity acquittees, he found it "obviously quite different . . . to assert that the State is allowed to confine anyone who is dangerous for as long as it wishes." *Id.*

48 *See Baxstrom*, 383 U.S. at 107.

49 The *Baxstrom* Court deemed civil commitment subsequent to a penal sentence to be constitutionally permissible. Baxstrom v. Herold, 383 U.S. 107 (1966). In *Allen v. Illinois*, 478 U.S. 364 (1986), the Court defined Illinois's Sexually Dangerous Persons Act to be civil, rather than criminal, because the statute served to provide treatment, not punishment to sexually dangerous persons. *See id.* at 369. The Court relied heavily upon the conclusion of the Illinois Supreme Court that the law is essentially civil in nature, the obligation of the state to provide care and treatment in order to effect recovery, and the ability of the committed person to apply for release at any time. *See id.* at 369. The *Allen* Court did not indicate that its analysis would differ if the commitment proceedings were instituted subsequent to, rather than in lieu of, a criminal sentence.

Similar to the other cases involving civil commitment proceedings, a sharply divided Court decided *Allen v. Illinois*. *Id.* The dissenting Justices (Stevens, Brennan, Marshall, and Blackmun) adamantly argued that the scheme was criminal in nature because of its relationship to Illinois's criminal law, as well as the central role the criminal law occupies in the civil commitment proceedings. *See id.* at 377 (Stevens, J., dissenting). The dissent concluded that the majority "permitt[ed] a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment [which] conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society." *Id.* at 384 (Stevens, J., dissenting). Additionally, in *Jackson v. Indiana*, 406 U.S. 715, 729-30 (1972), the Court specifically noted that it "cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence."

b. Allen v. Illinois: *Support for Finding Modern Sexually Dangerous Persons Acts Civil in Nature*

Although *Baxstrom* generally authorized the civil commitment of criminals who complete their penal terms, the nature of sexually violent predator statutes must be examined in order to determine whether they are criminal or civil in nature. In *Allen v. Illinois*,[50] the Supreme Court declared Illinois's sexually violent predator statute to be civil in nature for purposes of the Fifth Amendment's prohibition against self-incrimination.[51] Terry B. Allen was charged with unlawful restraint and deviate sexual assault,[52] after which the state filed a petition asking that he be declared a sexually dangerous person.[53] An Illinois Circuit Court ordered Allen to undergo two psychiatric examinations.[54] Although Allen objected to the elicitation of the psychiatric information as violative of his privilege against self-incrimination, the court found him to be a sexually dangerous person within the meaning of the Illinois statute.[55]

The United States Supreme Court ultimately defined Illinois' Act as civil in nature. The Court first looked to the Act's construction and highlighted Illinois's express provision that the Act "shall be civil in nature."[56] It deferred to the conclusion of the Illinois Supreme Court that the proceedings are civil in nature.[57] The *Allen* majority found that Illinois did not wish to punish, but instead, sought to treat sexually dangerous persons.[58] Notwithstanding the fact that the proceedings under the Illinois Act were compatible with those usually found in criminal trials, the Court held that providing safeguards applicable in criminal trials does not change civil proceedings into criminal prosecutions.[59]

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50 478 U.S. 364 (1986).

51 *See id.* at 374.

52 *See id.* at 365.

53 *See id.* The Illinois Sexually Dangerous Persons Act at issue in *Allen* provides the following definition:

> All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

Id. at 366 n.1 (quoting 725 ILL. COMP. STAT. 205/1.01 (West 1992)).

54 *See id.* at 366.

55 *See id.*

56 *Id.* at 368 (quoting 725 ILL. COMP. STAT. 205/1:01 (West 1992)).

57 *See id.* at 369.

58 *See id.* at 370.

59 *See id.* at 372.

Although the United States Supreme Court declared Illinois's Sexually Dangerous Persons Act[60] to be civil in nature, that finding does not automatically lead to the conclusion that other states' sexually violent predator statutes are also civil in nature. Illinois's Act authorizes civil commitment in lieu of a criminal sentence, while statutes such as Washington's allow for civil commitment subsequent to completion of a criminal sentence.[61] Read together, however, the rationales of *Baxstrom v. Herold*[62] and *Allen v. Illinois*[63] lead to the conclusion that the commitment of a sexually violent predator subsequent to the completion of his penal term is also civil in nature. *Baxstrom* held that the commitment of a prisoner nearing the expiration of his penal term does not differ from other civil commitments.[64] *Allen* declared Illinois's sexually violent predator statute to be civil because it aimed to provide treatment rather than punishment to its committees.[65] Based on these holdings, the fact that some modern sexually violent predator statutes authorize commitment *subsequent* to the completion of a penal term is irrelevant, provided that sexually dangerous persons "are confined under conditions [ ]compatible with the State's asserted interest in treatment."[66]

c. Addington v. Texas—*Mentally Ill and Dangerous Requirements*

Although states legitimately institutionalize citizens through civil proceedings, substantive due process demands certain restraints on the state's discretion to commit its citizens. *Addington v. Texas*[67] defines certain requirements necessary to detain individuals pursuant to civil proceedings. In *Addington*, Frank Addington appealed an order committing him to a Texas hospital for an indefinite period pursuant to a Texas civil commitment statute.[68] The statute required that the proposed patient be mentally ill, a condition which, in Texas, requires hospitalization for the patient's own welfare or the protection of others.[69] The trial judge presented the jury with two questions: "(1) Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill? (2) Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in

60 725 ILL. COMP. STAT. 205/1:01 *et. seq.* (West 1992).
61 WASH. REV. CODE § 71.09.030 (1992).
62 383 U.S. 107 (1966).
63 478 U.S. 364 (1986).
64 *See Baxstrom*, 383 U.S. at 110.
65 *See Allen*, 478 U.S. at 373.
66 *Id.*
67 441 U.S. 418 (1979).
68 *See id.* at 421. For the specific provisions of the statute, see TEX. CODE CRIM. PROC. ANN. art. 46.02 § 6 (West 1979) (amended 1989).
69 TEX. CODE CRIM. PROC. ANN. art. 46.02, § 6(b)(3) (West 1979) (amended 1989).

a mental hospital for his own welfare and protection or the protection of others?"[70] The jury answered both questions in the affirmative.[71] Addington argued that the standard for commitment violated his substantive due process rights, and that "any standard of proof for commitment less than that required for criminal convictions . . . violated his procedural due process rights."[72]

A unanimous United States Supreme Court

> concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, [and] turn[ed] to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state.[73]

The Court reasoned that in civil commitment proceedings, the factfinder must be persuaded by proof greater than the preponderance of the evidence standard.[74]

Although the *Addington* Court resolved a procedural due process issue of involuntary commitment, subsequent Supreme Court decisions cite *Addington* as defining the state's power to incapacitate individuals in civil commitment proceedings.[75] The *Addington* Court noted that

> [t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; *the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.*[76]

In one sentence the Supreme Court broadly defined a state's power to infringe upon the substantive due process rights of certain classes of citizens. Specifically, the Supreme Court declared civil commitment pursuant to the state's police power constitutionally permissible upon a showing of dangerousness and mental illness.

d. United States v. Salerno—*Regulatory Interests of the States*

The mental illness and dangerousness requirements of *Addington v. Texas*[77] provide but one avenue through which the state may legitimately commit individuals in civil proceedings. In *United States v. Sa-*

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70 *Addington*, 441 U.S. at 421.

71 *See id.*

72 *Id.* at 421-22.

73 *Id.* at 431.

74 *See id.* at 432-33.

75 *See* Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992); United States v. Salerno, 481 U.S. 739, 748-49 (1987).

76 *Addington*, 441 U.S. at 426 (emphasis added).

77 441 U.S. 418 (1979).

lerno,[78] the Supreme Court held that the Government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[79] The Supreme Court declared the authorization of detention based on future dangerousness found in the Bail Reform Act of 1984[80] to be permissible under the substantive component of the Due Process Clause. The Court first noted that the Act authorizes the commitment of only those individuals accused of "the most serious of crimes,"[81] and it then found the government's interest in preventing crime by arrestees both compelling and legitimate.[82] Additionally, the Court highlighted Congress's finding that individuals who fall into the class defined by the statute are "far more likely to be responsible for dangerous acts in the community after arrest."[83] The Court determined society's interest in crime prevention to be at its greatest under the narrow circumstances prescribed by the Act.

The *Salerno* Court reversed the Second Circuit's holding that "if a person is not charged with a crime, he may not, consistent with the principles of due process, be incarcerated simply on the ground that he is likely to commit a crime."[84] Although not presented with the precise issue, the Second Circuit reasoned that "[j]ust as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, *it would equally bar preventive detention of a person who has been convicted of past crimes and has served his sentence.*"[85] Finally, the Second Circuit analogized persons who complete criminal sentences to those not yet charged with a crime, and ultimately found that detaining either violated the Due Process Clause.[86]

The Supreme Court disagreed. Balanced against the state's interest in detaining dangerous persons prior to trial, the Supreme Court

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78 481 U.S. 739 (1987).

79 *Id.* at 748. The Court cited examples in which the Court upheld civil commitment schemes in order to protect public safety. Most notably, the Court cited *Addington v. Texas*, 441 U.S. 418 (1979), which upheld the government's power to detain mentally unstable individuals who present a danger to the public, and *Jackson v. Indiana*, 406 U.S. 715 (1972), which upheld the government's power to detain dangerous defendants who become incompetent to stand trial.

80 18 U.S.C. § 3141 *et. seq.* (1984).

81 *Salerno*, 481 U.S. at 747. *See* 18 U.S.C. § 3142(f) (1984) (detention hearings available in cases involving crimes of violence, offenses for which the sentence imposed is life imprisonment or death, serious drug offenses and for certain repeat offenders).

82 *See Salerno*, 481 U.S. at 749.

83 *Id.* at 750 (citing S. REP. No. 225, 98th Cong., 1st Sess. 6-7 (1983).

84 United States v. Salerno, 794 F.2d 64, 72 (2d Cir. 1986).

85 *Id.* (quoting United States v. Melendez-Carrion, 790 F.2d 984, 1001 (2d Cir. 1986) (emphasis added). Although the Second Circuit determined that a person who completes his criminal sentence for crimes of which he was found guilty may not be incarcerated to protect the public, it cited no authority for this proposition. *See id.* at 72-73.

86 *See id.* at 73. *See also* U.S. CONST. amend. XIV, § 1.

recognized that, in "circumstances where the government's interest is sufficiently weighty,"[87] an "individual's strong interest in liberty. . . may be subordinated to the greater needs of society."[88] The Court then concluded that Congress's "careful delineation of the circumstances under which detention will be permitted satisfies this standard."[89] The Supreme Court upheld the pretrial detention of a certain class of arrestees, although not yet convicted of any particular offense, based solely on clear and convincing evidence of a threat to society.[90] In addition, the Court cited the Speedy Trial Act[91] as imposing stringent time limitations on the length of pretrial detention.[92] Without more, the Supreme Court declined to further address time constraints on the pretrial detention authorized by the Bail Reform Act.[93]

The *Salerno* Court was not directly confronted with the issue of detaining a dangerous individual subsequent to completion of a criminal sentence in order to protect society. However, the Court resolved an analogous issue by upholding a statute authorizing the detention of a class of arrestees, not yet proven guilty of the alleged crime, based only on a perceived threat to society.[94] Although the state must provide certain procedural safeguards in order to commit individuals, the Supreme Court did not define the substantive due process limitations on the power of the state to detain those who present a danger to society.[95]

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87 United States v. Salerno, 481 U.S. 739, 750 (1987).

88 *Id.* at 750-51.

89 *Id.* at 751.

90 *See id.*

91 18 U.S.C. § 3161 (1982 & Supp. III).

92 *See Salerno*, 481 U.S. at 747. With this citation, the Court attempted to adequately address the concern of the Second Circuit that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." United States v. Salerno, 794 F.2d 64, 71 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987).

93 Although the Supreme Court was not concerned specifically with time limitations, Chief Judge Feinberg's dissenting opinion in the Second Circuit argued that a pretrial detention for dangerousness "does not violate the Due Process Clause when there is clear and convincing proof that a person already under indictment for a serious crime would commit another crime if released, if the detention has not continued so long as to constitute punishment." *Salerno*, 794 F.2d at 75 (Feinberg, J., dissenting). Concerned throughout his opinion about the length of confinement, Chief Judge Feinberg concluded that the "built-in limit on the length of the period for which an accused person may be detained" adequately addressed his concerns and contributed to his decision to uphold the Bail Reform Act on due process grounds. *Id.* at 77-78.

94 United States v. Salerno, 481 U.S. 739, 751 (1987).

95 *See* David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 542 (1992).

e. Foucha v. Louisiana—*Mentally Ill and Dangerous Requirements Revisited*

Five years after *United States v. Salerno*,[96] the Supreme Court considered the substantive due process limitations imposed upon the state in civil commitment proceedings. In *Foucha v. Louisiana*,[97] an insanity acquittee challenged a Louisiana statute calling for civil commitment subsequent to an acquittal by reason of insanity.[98] A two-member sanity commission reported that Foucha "[was] in remission from mental illness but [they could not] certify that he would not constitute a menace to himself or others if released."[99] One doctor further testified that Foucha had an antisocial personality not amenable to treatment rather than a mental disease.[100] The Court held that the statute violated substantive and procedural due process protections,[101] primarily because the statute "allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness."[102]

The *Foucha* majority referred to *Addington v. Texas*,[103] in which the Court required a "burden equal to or greater than the 'clear and convincing' standard" in order to meet due process guarantees in determining mental illness.[104] In *Addington*, the Court stated that "the state has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[105] Primarily concerned with the burden of proof necessary to commit an individual to a mental institution in a civil proceeding, the *Addington* Court concluded that proof beyond a reasonable doubt was "one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered."[106] The *Addington* Court considered civil com-

96 481 U.S. 739 (1987).

97 504 U.S. 71 (1992).

98 *See id.* at 73. The Court recognized that insanity acquittees and persons subject to civil commitment are not similarly situated, and that the States may treat the two differently. *See id.* at 85-86.

99 *Id.* at 74-75.

100 *See id.* at 75.

101 *See id.* at 83.

102 *Id.* at 73.

103 441 U.S. 418 (1979).

104 *Id.* at 433.

105 *Id.* at 426.

106 *Id.* at 427. The Court's concern focused on commitment based on abnormal behavior "which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." *Id.* at 426-27. In order to insure that a factfinder would not choose to commit an individual based only on isolated instances of unusual conduct, the Court ruled that due process requires confinement by proof "more substantial than a mere preponderance of the evidence." *Id.*

mitment proceedings appropriate only when the court determines an individual is both mentally ill and dangerous to either himself or others.[107] However, the *Addington* Court used mental disorder and mental illness interchangeably, which consequently raises doubts about the precise definition the Court attaches to the mental illness requirement.[108] In demanding proof greater than preponderance of the evidence, the *Addington* Court attempted to insure that loss of liberty would incur only with "a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."[109]

The *Foucha* Court also relied on *O'Connor v. Donaldson*,[110] in which the Court held that "there is no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in prison."[111] *O'Connor* stands for the proposition that a state cannot constitutionally confine a harmless, mentally ill person.[112] The issue in *Foucha*, however, involved whether a state can constitutionally confine an individual determined to have a personality disorder who poses a danger to himself or others.[113] The *Foucha* majority's concern focused on civil commitment schemes allowing for indefinite detention based on a past criminal act and an antisocial personality that occasionally leads to aggressive conduct.[114] According to the Court, upholding commitment based on past criminal conduct and antisocial personality features:

> would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term.* It would also be only a step away from substituting confinements for dangerousness for our present system which, *with only narrow exceptions and aside from permissible confinements for mental illness,* incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.[115]

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107 *See id.* at 429. Additionally, the Court included necessary therapy as a defining factor in determining the appropriateness of civil commitment. The opinion does not clarify whether the Due Process Clause or simply the Texas statute at issue in the case requires this factor. *See id.* at 428 n.4 ("The State of Texas confines only for the purpose of providing care designed to treat the individual.").

108 *Compare, e.g., Salerno*, 441 U.S. at 426 (referring to "mental or emotional disorder") *and id.* at 429 (using the term "mental illness").

109 *Id.* at 426-27.

110 422 U.S. 563 (1975).

111 *Id.* at 575.

112 *See id.* at 576.

113 *See Foucha*, 504 U.S. at 73.

114 *See id.* at 82.

115 Foucha v. Louisiana, 504 U.S. 71, 82 (1987) (emphasis added). *Allen v. Illinois*, 478 U.S. 364 (1986), stands in contrast to *Foucha v. Louisiana* and *Addington v. Texas*, 441 U.S.

The Court distinguished the detention scheme challenged in *United States v. Salerno* as a narrowly focused and carefully limited exception permitted by the Due Process Clause.[116] The *Foucha* Court refused to define Louisiana's involuntary commitment scheme as either.[117]

Concurring, Justice O'Connor narrowly defined the Court's opinion as addressing only the specific statutory scheme before it.[118] O'Connor would accord great deference to reasonable legislative judgments about the nexus between behavior and mental illness[119]—a principle expressed in *Jones v. United States.*[120] In *Jones*, the Court held that "the finding of insanity at the criminal trial [is] sufficiently probative of mental illness and dangerousness to justify [civil] commitment" subsequent to a not guilty verdict by reason of insanity.[121] Justice O'Connor implicitly accepted a broadened scope through which the state can involuntarily detain individuals by requiring only "some medical justification" for confining mental patients.[122]

Justice Kennedy's dissent quickly turned the logic of the majority on its head. He faulted the majority for relying on *O'Connor* and *Addington* which set parameters for involuntary civil commitment, while *Foucha* dealt specifically with the criminal context.[123] Justice Kennedy argued that the cases cited by the majority stand for "the proposition that in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence."[124] Justice Kennedy did not specifically require mental illness, but instead required proof of insanity, yet again undefined. Justice Kennedy recognized that "it is now well established that insanity as defined by the criminal law has no direct analog in medicine or sci-

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418 (1979). In *Allen*, the Court declared Illinois's Sexually Dangerous Persons Act not criminal for purposes of the Fifth Amendment's guarantee against compulsory self-incrimination. The Court accepted the Illinois Supreme Court's unanimous holding that the state's sexually dangerous persons statute sought primarily to provide treatment, not punishment for those "suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, coupled with criminal propensities to the commission of sex offenses." *Allen*, 478 U.S. at 366-67 n.1. Although the issue on appeal did not concern substantive due process and the Court did not specifically address it, the Court, likewise, expressed no concern about a civil commitment scheme based on a mental disorder.

116 *Foucha*, 504 U.S. at 81-82.

117 *See id.* at 83.

118 *See id.* at 86 (O'Connor, J., concurring).

119 *See id.* at 87.

120 463 U.S. 354 (1983).

121 *Id.* at 374 (Brennan, J., dissenting).

122 *Foucha*, 504 U.S. at 86. Although Justice O'Connor specifically wrote about the mental health of insanity acquittees, she clearly stated that the State's commitment scheme must give due regard to the particular crime for which the individual was acquitted by reasons of insanity. *See id.*

123 *See id.* at 93-94.

124 *Id.*

ence."[125] Justice Kennedy acknowledged that present sanity would be a relevant inquiry if the state commits an individual pursuant to a civil scheme.[126]

Filing a separate dissent, Justice Thomas criticized the majority for failing to set forth a standard applicable to judge the substantive due process implications of the statute and for not explaining what, if any, fundamental right the statute implicated.[127] Thomas argued that the Court historically and consistently applied a deferential standard of review to state laws involving involuntary confinement of the mentally ill. He criticized the majority for employing the strict scrutiny test when it ruled Louisiana's scheme violative of substantive due process because it was not sharply focused or carefully limited.[128] Thomas reverted to the substantive due process analysis on which the Court in *Jones* relied: "[D]id the means chosen by Congress (commitment of insanity acquittees until they have recovered their sanity or are no longer dangerous) reasonably fit Congress' ends (treatment of the acquittee's mental illness and protection of society from his dangerousness)?"[129] Justice Thomas apparently would require a state to meet the less demanding burden of the rational basis test under a challenge to its civil commitment legislation.

Justice Thomas also criticized the majority for defining Louisiana's scheme as indefinite, because the scheme entitled insanity acquittees to annual release hearings at their request.[130] Additionally, "Louisiana's statute provides for 'indefinite' commitment only to the extent that an acquittee is unable to satisfy the substantive standards for release."[131] Finally, Justice Thomas found the Louisiana scheme at least substantively reasonable,[132] although he made no attempt to defend the law under the more narrow strict scrutiny analysis.

Understanding the limitations on the state's authority to incapacitate potential civil committees is central to determining the constitutionality of modern sexually violent predator statutes. Subsequent to defining modern sexually violent predator statutes as civil in nature

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125 *Id.* at 96. *See also* JOHN BIGGS, JR., THE GUILTY MIND 117 (1955) ("[T]he divergence between law and psychiatry is caused in part by the legal fiction represented by the words 'insanity' or 'insane,' which are a kind of lawyer's catchall and have no clinical meaning.").

126 *See Foucha*, 504 U.S. at 96.

127 *See id.* at 116 (Thomas, J., dissenting).

128 *See id.* at 117. Justice Thomas admitted that the standard of review applied in *United States v. Salerno*, 481 U.S. 739 (1987), required a carefully limited scheme. However, he questioned whether the same standard should apply in the present case, and faulted the Court for not explicitly defining the standard used to reach its conclusion that Louisiana's involuntary commitment scheme is unconstitutional. *See Foucha*, 504 U.S. at 117.

129 *Id.* at 120-21.

130 *See id.* at 124.

131 *Id.* at 123.

132 *See id.*

and reviewing Supreme Court precedents concerning the state's power to commit individuals pursuant to civil commitment proceedings, an introduction to the structure, purposes, and case law surrounding sexually violent predator statutes uncovers the recent controversies surrounding the laws.

B. Modern Sexually Violent Predator Statutes

1. *Washington State's Sexually Violent Predator Act*

Washington was the first state to enact a sexually violent predator statute authorizing civil commitment subsequent to completion of a penal sentence. Washington first addressed the release of violent sex offenders from prison who are not determined to be mentally ill, but who continue to pose a tremendous danger to the community.[133] Washington's Sexually Violent Predator Act serves as an interesting example of the modern statutes due to the tremendous controversy surrounding the statute's unique procedural structure, substantive implications, and recent judicial scrutiny.

a. *Legislative History*

Washington's legislature enacted the Sexually Violent Predator Act in response to the 1989 attack of a Washington boy by a repeat sexual offender,[134] Earl Kenneth Shriner, whose criminal history dated back to 1966.[135] The state, considering Shriner extremely dangerous but not amenable to psychiatric treatment, released him from prison in 1987. Despite Shriner's "unusual sexually sadistic fantasies with plans to carry them out,"[136] the state's civil commitment laws did not allow for commitment without a recent overt act of dangerousness.[137] Two years after his release, Shriner violently raped, stabbed, strangled, and sexually mutilated a seven year old boy.[138] The community reacted strongly to the attack and, consequently, established the Task Force on Community Protection to examine the criminal system and effectively deal with repeat sex offenders.[139]

The Task Force on Community Protection evaluated and proposed changes in the law.[140] "The [t]ask [f]orce found 'gaps' in the existing system of determinate, but short, sentencing ranges and indefinite, but inapplicable, involuntary commitment laws."[141] It con-

133 *See* Leone, *supra* note 1, at 890-91.
134 *See id.* at 891 n.7.
135 *See* Boerner, *supra* note 95, at 526.
136 Gleb, *supra* note 3, at 213.
137 *See* WASH. REV. CODE ANN. § 71.05.020 (West 1992).
138 *See* Boerner, *supra* note 95, at 529.
139 *See id.* at 537-38.
140 *See id.* at 538.
141 Young v. Weston, 898 F. Supp. 744, 746 n.1 (W.D. Wash. 1995).

ducted six public hearings throughout Washington "to discover what citizens believe[d were] the major flaws in [their] state's laws regarding sexual and violent offenders."[142] Although the findings of the Task Force contained emotional narratives of members of the public, they also relied on statistics and reports which documented the nature of sexual offenses including information from the United States Surgeon General, the Centers for Disease Control, and the Bureau of Justice Statistics.[143]

In adopting the statute authorizing the indefinite commitment of sexual predators, the Washington legislature found that the existing involuntary treatment act, intended as a short-term civil commitment system for individuals with serious mental disorders, was inappropriate for the "small but extremely dangerous group of sexually violent predators . . . who do not have a mental disease or defect."[144] Instead, the legislature determined that this group of sexual offenders suffered from antisocial personality features unamenable to existing mental illness treatment methods.[145] The legislature determined the potential for curing sexually violent offenders was unlikely, and concluded that the treatment needs for this population are both long-term and nontraditional.[146] The legislature further found that the recidivism rates of sexually violent predators were extremely high.[147] The existing commitment act inadequately addressed the group's risk of reoffending primarily because offenders do not have access to potential victims during confinement and therefore will not engage in the overt act required by the involuntary treatment act for continued confinement.[148]

Although not all states adhere to its precise framework, many states have modeled their sexually violent predator laws after that of Washington. For example, Kansas patterned its predator act after Washington's statute, relying in part on the Washington Supreme Court's decision to uphold the statute and the civil commitment scheme as consistent with federal constitutional guarantees.[149] In ad-

142 J. Christopher Rideout, *So What's In a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781, 787 (1992).

143 *See id.* at 786, 788.

144 WASH. REV. CODE § 71.09.010 (1992).

145 *See id.*

146 *See id.*

147 *See id.*

148 *See id.*

149 *See* McCaffrey, *supra* note 1, at 889; *see also In re* Young, 857 P.2d 989, 1018 (Wash. 1993) (upholding the constitutionality of the Sexually Violent Predator Act).

dition, Iowa,[150] Wisconsin,[151] and New Jersey[152] recently enacted sexually violent predator statutes. Likewise, legislatures in Arkansas, Ohio, Oregon, Rhode Island, and South Carolina are considering sexually violent predator laws consistent with the Washington statute.[153]

b. *Substantive Aspects of the Statute*

Washington's statute defines a sexually violent predator as an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."[154] Although the statute does not define personality disorder, it defines a "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."[155] The statute defines predatory acts as "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."[156]

Pursuant to Washington's statute, the state can initiate the involuntary commitment process prior to the expiration of the defendant's criminal sentence for a sexually violent offense, prior to the release of a person incompetent to stand trial on a sexually violent offense charge, or upon a verdict of not guilty by reason of insanity for a person charged with committing a sexually violent offense.[157] Either the county prosecutor or attorney general files a petition alleging that the defendant is a sexually violent offender,[158] and a judge makes a probable cause determination.[159] If probable cause exists, the judge directs the person to be taken into custody and transferred to a facility for evaluation "by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the De-

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150 IOWA CODE § 709(C) (1995).

151 WIS. STAT. § 980 (1994); *see also* Erich C. Straub & James E. Kachelski, *The Constitutionality of Wisconsin's Sexual Predator Law*, 68 WIS. LAW. 14 (1995) (discussing arguments of opponents and proponents of the statute and questioning the statute's constitutionality).

152 N.J. STAT. ANN. §§ 2C:47-1 to 8 (West 1982 & Supp. 1990); Leone, *supra* note 1, at 892-94 (describing the legislative history of New Jersey's Sexually Violent Predator's Act of 1993).

153 *See, e.g.*, 18th Ark. Leg., 2d Sess. (1994); H. 396, 120th Ohio Gen. Ass., 1993-94 Reg. Sess. (1993); H. 3218, 67th Or. Leg., Reg. Sess. (1993); H. 8350, R.I. Reg. Sess. (1994); H. 3193, 1993 S.C. Statewide Sess. (1993); *see* Leone, *supra* note 1, at 892 n.8.

154 WASH. REV. CODE § 71.09.020(1) (1992).

155 *Id.* § 71.09.020(2).

156 *Id.* § 71.09.020(3).

157 *Id.* § 71.09.030.

158 Young v. Weston, 898 F. Supp. 744, 747 (W.D. Wash. 1995) (citing WASH. REV. CODE § 71.09.030 (1992)).

159 *See id.*

partment of Social and Health Services."[160] The statute entitles the detainee to a trial within forty-five days, the right to counsel and experts, and affords both parties the right to a jury trial.[161] Either the jury or the court determines, beyond a reasonable doubt, whether the person falls within the statute's definition of a sexually violent predator.[162] If resolved in the affirmative, then the state commits the sexually violent predator to a secure facility under the control of the Department of Social and Health Services for control, care, and treatment until the Department determines the person safe to be released.[163]

Due to security problems, the statute forbids sexually violent predators from being detained in state mental facilities or regional rehabilitation centers.[164] Instead, sexually violent predators must be confined in facilities located within correctional institutions.[165] The statute does not specify treatment requirements, although the mental condition of the committed person is evaluated once each year.[166] Both care and treatment must conform to "constitutional requirements."[167]

A detainee must petition the court to obtain release. Subsequent to a determination by the Secretary of the Department of Social and Health Services that "the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of violence if released,"[168] the Secretary authorizes the detainee to file a petition.[169] A hearing must be held within forty-five days, and the state must again prove beyond a reasonable doubt that the petitioner is not safe to be at large as a result of his mental condition, and will likely engage in predatory acts of violence if discharged.[170] Absent authorization by the Secretary, the detainee may still petition the court for release.[171] The Secretary must annually provide the detainee written notice of his right to petition the court with-

160 *See id.*

161 WASH. REV. CODE § 71.09.050 (1992).

162 *See id.*

163 *See id.* § 71.09.060(1).

164 *See* Young v. Weston, 898 F. Supp. 744, 747 (W.D. Wash. 1995) (citing WASH. REV. CODE § 71.09.060(3) (1992)).

165 *See id.*

166 *See id.* (citing WASH. REV. CODE §§ 71.09.070 & .080 (1992)).

167 *Id.*

168 WASH. REV. CODE § 71.09.090(1); *see also* Young v. Weston, 898 F. Supp. 744, 747-48 (W.D. Wash. 1995) (describing Washington's Sexual Predator Act, WASH. REV. CODE §§ 71.090, 71.100 (1992)).

169 *See* Young v. Weston, 898 F. Supp. 744, 747 (W.D. Wash. 1995) (citing WASH. REV. CODE § 71.09.090(1) (1992)).

170 *See id.*

171 *See id.* (citing WASH. REV. CODE § 71.09.090(2) (1992)).

out prior approval.[172] If the detainee chooses to exercise his right to petition, the court must conduct a show cause hearing to determine whether sufficient facts exist to warrant a hearing on whether the detainee is safe to be at large.[173] Although not entitled to be present at the show cause hearing, the detainee is entitled by statute to representation by counsel.[174] If probable cause exists, the court must hold a hearing similar to the original commitment hearings.[175] Absent these annual review procedures, "unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted,"[176] the detainee has no right to a hearing on a petition for release.

2. *Constitutional Challenges of Modern Sexually Violent Predator Statutes*

a. *Washington*—Young v. Weston

Young v. Weston,[177] currently pending on appeal in the Ninth Circuit, reflects the legal issues implicated by these predator statutes and, more generally, the scope of the state's authority to incapacitate individuals who pose potential threats to society.[178] Young's criminal history includes six convictions for violent felony rape.[179] One day before Young's release from prison for a 1985 rape conviction, the state filed a petition under its sexually violent predator statute. The state confined Young in a special commitment center from October 24, 1990 until his trial in February 1991.[180] Young refused to participate in psychiatric evaluations, and the state prohibited his attendance at a pretrial hearing in mid-January 1991, at which the Superior Court rejected constitutional challenges to the statute.[181] Subsequent to a jury determination of his status as a sexually violent predator, the court committed Young to a treatment facility pursuant to its sexually violent predator statute.[182]

Young originally challenged the constitutionality of the sexual predator statute on double jeopardy and ex post facto grounds.[183] The Washington Supreme Court determined en banc that "[i]n light of the Statute's language and legislative history . . . it is clear that the

172 *See id.*
173 *See id.* at 748.
174 *See id.*
175 *See id.*
176 WASH. REV. CODE § 71.090.090(2) (1992).
177 898 F. Supp. 744 (W.D. Wash. 1995).
178 *See id.*
179 *See In re* Young, 857 P.2d 989, 994 (1993) (en banc).
180 *See* Young v. Weston, 898 F. Supp. 744, 748 (W.D. Wash. 1995).
181 *See In re* Young, 857 P.2d at 994.
182 *See id.*
183 *See id.* at 996.

Legislature intended a civil statutory scheme."[184] Relying on *Allen v. Illinois*,[185] the United States Supreme Court case holding Illinois's sexually violent predator statute civil in nature for purposes of the Fifth Amendment's protection against self-incrimination, the Washington Supreme Court analogized its sexual predator law to the Illinois statute at issue in *Allen*.[186] Unlike Washington's sexually violent predator statute, Illinois's sexually violent predator act provides for commitment in lieu of a criminal sentence.[187] Notwithstanding this difference, the Washington Supreme Court, based on the language, history, purposes, and effect of the statute, ultimately found the state's sexually violent predator statute civil in nature.[188] Because the prohibitions against double jeopardy and ex post facto laws only apply to criminal measures, the Washington Supreme Court reasoned that Washington's predator statute did not violate these constitutional prohibitions.[189]

Young also argued that the statute violated his substantive due process rights.[190] The Federal Constitution requires that a person shall not be deprived of life, liberty, or property without due process of law.[191] Because an individual's liberty interest is a fundamental right,[192] the court applied strict scrutiny which declares constitutional only those state laws that further compelling state interests and are narrowly drawn to serve those compelling interests.[193] The court found the state's asserted interest in treating sexual predators and protecting society from sexual predators to be compelling.[194] In order to permit civil commitment under the Due Process Clause, a per-

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184 *Id.* at 997.

185 478 U.S. 364 (1986); *see* discussion *supra* Part II.A.1.b.

186 *See In re Young*, 857 P.2d at 997. Although *Allen* involved the Fifth Amendment's guarantee against compulsory self-incrimination, then Justice Rehnquist determined the proceedings civil due to its aim to provide treatment, not punishment, for sexually dangerous persons. *See Allen*, 478 U.S. at 373. Although the Act provides safeguards similar to those applicable in criminal proceedings, such safeguards did not make the proceedings criminal. *See id.* at 371-72. The Supreme Court found that the Act did not promote "the traditional aims of punishment—retribution and deterrence." *See id.* at 370 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)). *See supra* Part II.A.1.b.

187 ILL. COMP. STAT. 205/1:01 *et seq.* (West 1992).

188 *See In re Young*, 857 P.2d at 996-99.

189 *See id.* at 996-100 (concluding that "[d]ouble jeopardy does not apply, however, unless the sanction sought to be imposed in the second proceeding is punitive in nature so that the proceeding is essentially criminal."); *see also* United States v. Halper, 490 U.S. 435, 448 (1989) (a "civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment").

190 *See In re Young*, 857 P.2d at 1000-04.

191 U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

192 *See In re Young*, 857 P.2d at 1001 (citing United States v. Salerno, 481 U.S. 739, 750 (1987)).

193 *See id.* at 1000 (citing State v. Farmer, 805 P.2d 200, 208 (Wash. 1991); *In re* Schuoler, 723 P.2d 1103, 1108 (Wash. 1986)).

194 *See In re Young*, 857 P.2d at 1000.

son must be both mentally ill and dangerous.[195] Although Washington State's sexually violent predator statute requires proof of a "mental abnormality or personality disorder" for civil commitment,[196] the court determined that the Supreme Court "has always used the term 'mentally ill' interchangeably with 'mentally disordered.'"[197] On this basis, the court overruled Young's substantive due process objections.

Subsequent to the Washington Supreme Court's ruling, the United States District Court for the Western District of Washington held in *Young v. Weston*[198] that Washington's sexually violent predator statute is an unconstitutional violation of the Due Process Clause,[199] the Ex Post Facto Clause,[200] and the Double Jeopardy Clause.[201] The court determined that "[t]he essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill."[202] The court considered the legislature's findings that "sexual predators 'have antisocial personality features which are unamenable to existing mental illness treatment modalities,' and for which the prognosis of cure is poor."[203] The Washington State Psychiatric Association's Amicus Brief similarly attested that "the term 'mental abnormality' retains neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals."[204] Finally, the court used the act's legislative history to prove that the state intended to involuntarily commit persons regardless of mental health.[205] Based upon these conclusions, the court determined that Washington's statute violated the substantive protection of the Due Process Clause.[206]

The district court next considered Young's ex post facto challenge. Contrary to the conclusions reached by the Washington

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195 *See* Addington v. Texas, 441 U.S. 418, 433 (1979) (must have proof of mental illness and dangerousness); *see also* Foucha v. Louisiana, 504 U.S. 71, 75-78 (1992) (noting that in certain circumstances persons who pose a danger to others or to the community may be subject to limited confinement).

196 WASH. REV. CODE § 71.09.020(1) (1992).

197 *In re* Young, 857 P.2d at 1001.

198 898 F. Supp. 744 (W.D. Wash. 1995).

199 *See id.* at 750.

200 *See id.* at 753.

201 *See id.* at 754.

202 *Id.* at 749.

203 *Id.*; *see* WASH. REV. CODE § 71.09.010 (1992).

204 *Young*, 898 F. Supp. at 750.

205 *See id.* "Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable." *Id.* (citing *Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington*, II-21 (1989)).

206 *See id.*

Supreme Court, the district court defined the statute as criminal in nature, primarily because it applies to criminal behavior and promotes the traditional aims of punishment.[207] The court found the statute both retrospective and disadvantageous, and, therefore in violation of the Constitution's ex post facto prohibition.[208]

Finally, the court considered the statute's double jeopardy implications. The court found that Washington's statute punishes the individual twice: once criminally for the commission of a violent sexual offense and once civilly under the commitment scheme.[209] Because the statute primarily serves the traditional aims of punishment and secondarily provides treatment, the court concluded that the statute also violates the Double Jeopardy Clause.[210]

Until Young's case is decided by the Ninth Circuit, Young will remain in detention.[211] At the very least, the district court's ruling raises serious doubts about the constitutionality of the civil commitment scheme of Washington's sexually violent predator statute, a scheme many states have replicated in a similar attempt to detain sexually violent predators for the public's safety.

b. *Minnesota*—In re Blodgett[212]

Minnesota's sexually violent predator ("psychopathic personality") statute should be considered against this backdrop.[213] The Minnesota statute provides for the civil commitment of any person found to be a sexual psychopathic personality.[214] The statute defines a "psychopathic personality" as

> the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of [personal] acts, or a combination of any such conditions, as to render such person irresponsible for [personal] conduct with respect to sexual matters and thereby dangerous to other persons.[215]

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207 *See id.* at 752.

208 *See id.* at 753.

209 *See id.* at 754.

210 *See id.*

211 *See* Rorie Sherman, *Psychiatric Gulag or Wise Safekeeping: Lawmakers Use Civil Commitment to Detain Sexual Predators*, NAT'L L.J., Sept. 5, 1994, at A1.

212 510 N.W.2d 910 (Minn. Sup. Ct. 1994) (en banc).

213 On December 12, 1996, the Minnesota Supreme Court upheld its state's sexually dangerous persons act in *In re Linehan*, 557 N.W. 2d. 171 (Minn. 1996). The court found that the law did not violate substantive due process, equal protection, ex post facto, or double jeopardy under either the state or federal constitutions.

214 MINN. ANN. STAT. § 253B.02 (West. Supp. 1997).

215 *Id.* § 253B.02(18a).

This statute, as construed by the Minnesota Supreme Court in *Pearson v. Probate Court of Ramsey County*,[216] applies only to persons who display a "habitual course of misconduct in sexual matters" and "an utter lack of power to control their sexual impulses" so that the persons will likely "attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire."[217] Similar to the Washington statute, Minnesota's statute authorizes civil commitment subsequent to the completion of a penal term.

Minnesota's historic psychopathic personality statute has survived many constitutional challenges.[218] In *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*,[219] the Court upheld the statute against vagueness, procedural due process, and equal protection challenges.[220] Subsequently, in *In re Blodgett*,[221] the Minnesota Supreme Court held that the statute, which commits repeat sexual offenders to a security hospital subsequent to the expiration of criminal sentences, did not violate substantive due process.[222] Blodgett unsuccessfully argued that *Foucha v. Louisiana*,[223] a case in which the United States Supreme Court required the state to prove mental illness and dangerousness in order to involuntarily commit an individual, demanded that the Court declare Minnesota's sexual psychopath statute unconstitutional.[224]

As stated above, *Foucha* identified three instances of confinement which may constitutionally deprive an individual of his or her liberty: (1) imprisonment of convicted criminals for deterrence and retribu-

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216 State *ex rel.* Pearson v. Probate Court of Ramsey County, 287 N.W. 297 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940).

217 *Id.* at 302.

218 Subsequent to the Supreme Court of Minnesota's opinion in *In re* Linehan, 518 N.W.2d 609 (Minn. Sup. Ct. 1994), Minnesota's legislature amended its psychopathic personality laws. The Minnesota statutes now incorporate the *Pearson* test for sexual psychopathic personality. *See* MINN. STAT. ANN. § 253B.02(18a) (West Supp. 1997). Additionally, a separate category of sexually dangerous persons now exists. *See id.* §§ 253B.02(7a), 253B.02(18b). A "sexually dangerous person" must (1) have engaged in "harmful sexual conduct" and (2) manifest a "sexual, personality, or other mental disorder or dysfunction" which makes them "likely to engage in [further] acts of harmful sexual conduct." *Id.* § 253B.02(18b); *see* Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 786-90 (1995) (discussing the Minnesota legislature's response to *In re Linehan*).

219 309 U.S. 270 (1940).

220 *See id.* at 274-77.

221 510 N.W.2d 910 (Minn. Sup. Ct. 1994) (en banc).

222 *See id.* at 914-16. *See also* Nicolaison v. Erickson, 65 F.3d 109 (8th Cir. 1995) (holding that the state did not violate the inmates' substantive due process rights despite the alleged lack of a specific finding that he had utter lack of power to control his sexual impulses).

223 504 U.S. 71 (1992).

224 Blodgett argued that *Foucha* overruled *Minnesota ex rel. Pearson*, 309 U.S. 270 (1940), the landmark case in which United States Supreme Court upheld the Minnesota Supreme Court's narrow construction of the statute. *See In re* Blodgett, 510 N.W.2d at 914.

tion; (2) confinement of persons mentally ill and dangerous; and, (3) in "certain narrow circumstances, persons who pose a danger to others or to the community may be subject to *limited* confinement."[225] This case stands for the proposition that the Supreme Court, in three instances, considers a state's interests compelling and the means narrowly drawn to serve those interests. Essentially, the Supreme Court anticipatorily determined the outcome of its balancing test in three narrowly defined situations.

Blodgett explicitly argued that "although he may be socially maladjusted, he is not in any way mentally ill. And if he is not ill, he may not be confined by the state, unless and until convicted of another crime."[226] Invalidating the substantive due process challenge, the Minnesota Supreme Court determined that *Pearson* may be a subset of *Foucha*'s mentally ill and dangerous category, or, alternatively, an additional category.[227] Provided the civil commitment affords treatment and periodic review, the court concluded that the statute did not violate due process.[228] The *Foucha* Court demanded proof of both mental illness and dangerousness in order to constitutionally detain an individual. The Minnesota Supreme Court thus reasoned that Blodgett may be released if his sexual disorder goes into remission.[229] This analysis, which considers release subsequent to the remission of a mental disorder, is certainly consistent with the release of insanity acquittees subsequent to a remission of insanity as mandated by the

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225 *Foucha*, 504 U.S. at 78-81 (emphasis added) (offering a pretrial detention of dangerous criminal defendants as an example of limited confinement).

226 *In re* Blodgett, 510 N.W.2d at 914.

227 The court did not consider the three categories in *Foucha*, exclusive. It mentioned three other situations in which Minnesota provides for civil commitment without mental illness—where the detainee is mentally retarded, chemically dependent, or a health threat to others. *See Blodgett*, 510 N.W.2d at 914 n.6; *see also* MINN. STAT. §§ 253B.02(2) & (14) (defining "mentally retarded" and "chemically dependant"), § 144.4172(8) (West Supp. 1997) (defining "health threat to others"). *See* Hammel, *supra* note 218, at 785

> [T]he [*Blodgett*] majority neglected to explain why it felt entitled to create a category of civil confinement "additional" to those allowed by *Foucha* when the thrust of *Foucha* and other detention cases is not to create categories but to carefully limit detention without trial and enunciate specific constitutional guidelines for civil commitment procedures.

(footnotes omitted).

228 *See Blodgett*, 510 N.W.2d at 916.

229 *See id.* In 1990, although confronted specifically with the issue of a right to treatment, the Eighth Circuit declared Minnesota's psychopathic personality statute, which carries an indeterminate commitment period, constitutionally valid. *See* Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991). It interpreted *Addington v. Texas*, 441 U.S. 418 (1979), as allowing the state to "confine people who pose a threat to themselves and others until the danger has dissipated." *See Bailey*, 940 F.2d at 1153. The court found the indefinite preventive detention based on mere dangerousness alone constitutionally permissible. *See id.* at 1154. *See* Hammel, *supra* note 218, at 780-81.

Foucha Court.[230] However, the court in *Blodgett* virtually ignored both the mental illness requirement of *Foucha* and the indefiniteness of its commitment and instead developed its own interpretation of the Minnesota statute.

c. *Wisconsin*—State v. Post

Under Wisconsin's Sexually Violent Person Commitments statute,[231] which also authorizes civil commitment subsequent to the completion of a penal sentence, the petition seeking commitment must allege that the person:

> has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty or not responsible for a sexually violent offense by reason of insanity, mental disease, defect or illness and . . . is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.[232]

A hearing must occur within seventy-two hours of filing the petition to determine whether probable cause exists that the subject of the petition falls within the definition of a sexually violent person.[233] If the petition fails to establish probable cause, the court must dismiss the petition. However, if the petition establishes probable cause, the court orders the individual transferred to a facility for evaluation.[234] The statute entitles the person to a full adversarial trial.[235]

Once the court determines that the person is sexually violent, it must commit him to the Department of Health and Social Services for control, care, and treatment until he or she no longer meets the statutory requirements.[236] If committed to a treatment facility, the sexually violent person may petition for supervised release every six months. The court must grant the petition unless the state proves with clear and convincing evidence that the person remains sexually violent and will likely commit acts of sexual violence.[237] In addition, the Secretary of the Department of Health and Social Services may authorize the filing of a petition for discharge at any time, and the court must grant

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230 The *Foucha* court, however, explicitly differentiated civil committees from insanity acquittees. *See Foucha*, 504 U.S. at 75-78.

231 WIS. STAT. ANN. § 980 (West Supp. 1996).

232 *Id.* § 980.01(7).

233 *See id.* § 980.04(1)-(3).

234 *See id.*

235 *See id.* § 980.05.

236 *See id.* § 980.06(1).

237 *See id.* §§ 980.08(1), (4).

the petition unless the state proves with clear and convincing evidence that the prisoner remains a sexually violent predator.[238]

The committed person receives written notice of his or her right to petition the court for discharge annually and in conjunction with mental reexaminations.[239] Similar to Washington's statute, if probable cause exists to believe the committed person no longer falls within the definition of the statute, the court must hold a hearing on the issue.[240] The state again carries the burden to prove with clear and convincing evidence that the person remains a sexually violent predator.[241] If the state fails to meet this standard, the state must discharge the person from custody.[242]

In *State v. Post*,[243] a 1995 case involving the civil commitment of a sexually violent predator in Wisconsin, a civil committee brought a substantive due process challenge against Wisconsin's sexually violent predator statute. In 1976, the Eighth Circuit committed Samuel E. Post to the custody of the Wisconsin Department of Health and Social Services and confined him to the Mendota Mental Health Institute subsequent to a conviction of two counts of sexual assault, armed robbery, and false imprisonment "stemming from incidents in which he abducted women from shopping mall parking lots and drove them to remote locations where he forced them to engage in oral sex acts."[244] Before Post's scheduled release, the Department of Justice filed a petition to commit Post as a sexually violent person.[245] At the probable cause hearing, the Forensic Clinical Director of the Mendota Mental Health Institute testified that Post suffered primarily from an "antisocial personality disorder with secondary atypical paraphilia."[246]

On the day of the probable cause hearing, Post filed a motion to dismiss the commitment petition on the grounds that the statute violated certain constitutional protections.[247] Granting the motions, the circuit court found that the statute violated constitutional protections against double jeopardy and ex post facto and constitutional guarantees of equal protection and substantive due process.[248] The Wiscon-

238 *See id.* §§ 980.09(1)(a)-(b).
239 *See id.* §§ 980.07(1), 980.09(2)(a).
240 *See id.* § 980.07(2)(b).
241 *See id.*
242 *See id.* §§ 980.09(2)(b) & (c).
243 541 N.W.2d 115 (Wisc. 1995).
244 *Id.* at 119.
245 *See id.*
246 *Id.* "[T]he essential feature of Antisocial Personality Disorders is a pervasive pattern of disregard for, and violation of, the rights of others. . . ." *Id.* at n.3 (citing the American Psychiatric Association, DIAGNOSTIC AND MANUAL OF MENTAL DISORDERS 645 (4th ed. 1994)).
247 *See id.* at 119.
248 *See id.*

sin Supreme Court disagreed and ultimately concluded that because the nature and duration of the Sexually Violent Person Commitments statute[249] reasonably relate to the State's compelling interests, the involuntary commitments do not infringe upon the committee's substantive due process rights.[250]

The Wisconsin Supreme Court defined the predator law as one that restricts a fundamental liberty and, thus, requires application of strict scrutiny in which "the challenged statute must further a compelling state interest and be narrowly tailored to serve that interest."[251] The court defined Wisconsin's dual interests as protecting the community from dangerous mentally disordered persons and providing care and treatment to mentally disordered persons predisposed to sexual violence.[252] The court found the state's interests both legitimate and compelling.[253]

The Wisconsin Supreme Court in *Post* focused much attention on the distinction between mental disorder and mental illness.[254] Because the "Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments,"[255] the Wisconsin Supreme Court held that mental disorder as defined in Wisconsin's sexually violent predator act satisfies the mental condition component required by substantive due process.[256] Not surprisingly, the dissent disagreed with the majority primarily "[b]ecause . . . [the statute] allows the indefinite confinement of persons who have not been found to be mentally ill, [and therefore] . . . beyond a reasonable doubt . . . violates substantive due process protections."[257] In part, the dissent's conclusion resulted from its criticism of the majority's inference that the mental illness component "can be defined howsoever the state pleases."[258]

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249 WIS. STAT. ANN. § 980 (West Supp. 1997).

250 *See* State v. Post, 541 N.W.2d 115, 118 (Wisc. 1995).

251 *Id.* at 122 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

252 *See id.*

253 *See id.*

254 *Id.* at 122-24.

255 *Id.* at 123.

256 *See id.*

257 *Id.* at 145 (Abrahamson, J., dissenting).

258 *Id.* at 142.

III
ANALYSIS

A. Sexually Violent Predator Acts—Involuntary Commitment Pursuant to Traditionally Recognized Sources of State Power

This Part first explains the sources of the state's power to incapacitate individuals. It analyzes the substantive due process requirements of civil commitment and attempts to define sexually violent predator statutes under traditional sources of state power. Finally, this Part predicts that the Supreme Court will uphold sexually violent predator statutes on substantive due process grounds.

Determining whether sexually violent predator statutes are constitutional first requires an understanding of the traditional sources of a state's power to assert physical control over its citizens. The state's power to detain individuals derives from one of two sources recognized as legitimate by the Supreme Court: its police powers or its *parens patriae* powers.[259] Police powers allow the state to protect the community from "the dangerous tendencies of some who are mentally ill."[260] That is, the state incapacitates individuals pursuant to civil proceedings solely to protect society under its police powers. Under its *parens patriae* powers, the state provides care to citizens unable to care for themselves because of emotional disorders or age.[261] In essence, the Supreme Court anticipatorily applied its strict scrutiny test to these scenarios and determined that the resulting deprivation of individual liberty was constitutionally legitimate.

1. *Civil Commitment Pursuant to the State's Parens Patriae Powers*

Parens patriae literally means "parent of the country"[262] and refers to the role of the state as sovereign and guardian of persons under legal disability.[263] The principle embodies the notion that the state must care for individuals incapable of caring for themselves and, for purposes of this Note, applies primarily to cases of civil commitment of the emotionally disturbed.

Review of *Robinson v. California*[264] uncovers the Court's willingness to recognize the state's authority to involuntarily commit individ-

259 *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

260 *Id.*

261 *See id.*

262 BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

263 *See id.*

264 370 U.S. 660 (1962).

uals pursuant to its *parens patriae* powers.[265] The *Robinson* Court struck down a statute authorizing criminal conviction of narcotic addicts based on their status as addicts alone,[266] but it condoned the establishment of a program of involuntary confinement for compulsory treatment.[267] The Court recognized the state's ability to deal with victims of human afflictions with mandatory treatment for "general health and welfare."[268] The Court defined persons addicted to narcotics as "diseased and proper subjects for . . . treatment."[269] If this analysis remains sound today, the ability of the state to similarly commit sexually violent predators may be constitutionally permissible, specifically in light of the professional opinion that compulsive, repeat sexual offenders' behavior may be "controlled by the use of therapeutic techniques similar to those used in the treatment of alcoholics and drug addicts."[270]

Justice Douglas's concurring opinion in *Robinson* presses on these notions of mental illness and the state's ability to protect society while treating individuals afflicted with various diseases.[271] Douglas recognized legal variations in the definition of insanity, but he dismissed such differences and concluded that "however insanity is defined, it is in end effect treated as a disease."[272] Douglas then explicitly stated that such afflicted people may be confined for treatment *or* for protection of society.[273] He reached this conclusion notwithstanding his inability to define addiction as a disease or as a symptom of a mental or psychiatric disorder.[274] Justice Douglas considered addicts sick peo-

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265 The Court did not define specifically under which powers the State acts, although the Court appeared to condone commitment based on compulsory treatment rather than protection of society in general.

266 The Court objected to conviction based on a status or condition, as opposed to the more traditional and legally recognized volitional act. *See Robinson*, 370 U.S. at 664-65.

267 *See id.*

268 *Id.* at 666. The Court did not define whose general health and welfare the State would protect through quarantine, confinement, or sequestration. Although the Court suggested compulsory treatment, it remained unclear whether the secluded treatment sought to prevent danger to society, protect the individual from a previously existing disease, or both.

269 *Id.* at 667 n.8 (citing Linder v. United States, 268 U.S. 5 (1925)). At a minimum, this reference to the Court's 1925 opinion sheds light on the fact that the Court itself defines who is diseased and suitable for treatment. It also supports the proposition that definitions of legal and clinical mental illness differ.

270 Lawrence Wright, *A Reporter At Large: A Rapist's Homecoming*, THE NEW YORKER, Sept. 4, 1995, at 56.

271 *Robinson*, 370 U.S. at 668 (Douglass, J., concurring).

272 *Id.*

273 *See id.* at 668-69. Justice Douglas did not define the source from which the State retains the power to confine individuals for either end, although he probably referred to both the State's police and *parens patriae* powers.

274 *See id.* at 671-72. Although Justice Douglas noted that treatment for addicts is well-known, he did concede the difficulty in curing addicts. Similarly, the prognosis for curing sexually violent predators is poor and treatment modalities, although different, are not

ple and on no uncertain terms authorized their confinement for treatment *or* for the protection of society.[275]

In another civil commitment case, *Allen v. Illinois*,[276] the Supreme Court did not classify the Illinois Act as one passed pursuant to the state's police power or *parens patriae*. Instead, by declaring that "Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive,"[277] the Court developed a hybrid framework through which the state can constitutionally commit individuals in civil proceedings. However, whether the state acts within its *parens patriae* powers in order to "provid[e] care to its citizens who are unable because of emotional disorders to care for themselves"[278] is certainly suspect when the class is one of sexual predators[279] primarily because sexual predators do care for themselves in the ordinary course of their existences. Capable of taking care of themselves on a day-to-day basis, sexual predators do not fit within the class of persons for whom the state traditionally attempts to care under its *parens patriae* powers.

Washington's sexually violent predator statute defines mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."[280] It seems unlikely, if not impossible, to equate this definition with the class of persons the state legitimately commits under its *parens patriae* powers. These powers are primarily used to commit those found to be dangerous *only* to *themselves*.[281] However, Illinois's Sexual Predator Act, reviewed in *Allen v. Illinois*,[282] requires the existence of a mental disorder for more than one year. The *Allen* majority defined the state's authority to commit

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unknown to the psychiatric field. *See* WASH. REV. CODE § 71.09.010 (1992); *see also* Wright, *supra* note 270, at 55 (discussing treatment sessions of sexually violent predators).

275 *See Robinson*, 370 U.S. at 676.

276 478 U.S. 364 (1986).

277 *Id.* at 373.

278 Addington v. Texas, 441 U.S. 418, 426 (1979).

279 *See* Comment, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1293 (1966) ("Commitment for dangerousness to others serves the police power; commitment for dangerousness to self reveals the government as guardian to those members of the community unable to care for their own interests.").

280 WASH. REV. CODE § 71.09.020(2) (1992).

281 *See* Howard R. Hawkins, Jr. & Paul O. Sullivan, Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications*, 42 FORDHAM L. REV. 611, 616 (1974). One of the most difficult problems under this analysis remains the notion that the State uses its *parens patriae* powers when an individual is dangerous to himself in order to rehabilitate the mentally disturbed. This role benefits both the individual and society, and essentially, the guardianship role becomes the goal of the State's police powers. *See id.* at 617; *see* Beatrice K. Bleicher, *Compulsory Community Care for the Mentally Ill*, 16 CLEV.-MARSHALL L. REV. 93, 102 (1967).

282 478 U.S. 364 (1986).

individuals pursuant to the statute under traditionally recognized sources of power.[283] Although not specifically confronted with the issue of whether the scheme violated substantive due process, the Court implicitly legitimized the state's authority to commit individuals with mental disorders in order to protect society.[284]

2. *Civil Commitment Pursuant to the State's Police Powers*

The state's power to commit individuals is not limited to its *parens patriae* powers. Police powers, another source of the state's power to involuntarily detain individuals, embody the

> authority conferred by the American constitutional system in the Tenth Amendment . . . upon the individual states, and, in turn, delegated to local governments, through which they are enabled to . . . secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by general laws.[285]

More specifically, the state can legitimately place restrictions on a person's personal freedom for the protection of the public safety pursuant to its police powers. For example, a state imprisons convicted criminals in furtherance of deterrence and retribution principles pursuant to its police powers.[286] Although subject to the limitations of the Federal Constitution, the exercise of the state's police power allows the state "to promote order, safety, security, health, morals and

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283 *See id.* at 373. This conclusion results from the Supreme Court's declaration that Illinois decided "to supplement its parens patriae concerns with measures to protect the welfare and safety of other citizens." *Id.* The decision of the state to supplement its *parens patriae* concerns with its police powers did not render its sexually violent predator statute punitive. *See id.*

284 The limitations placed on the state's power to involuntarily commit individuals pursuant to its *parens patriae* power remains unclear. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court referred to those "who are unable because of emotional disorders to care for themselves." *Id.* at 426. In contrast, much commentary defines these individuals as unable to make decisions on their own, specifically unable to decide for themselves whether or not to pursue treatment. *See* Comment, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1297 (1966); *see also* John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 500 (1981) (traditional *parens patriae* authority allows the State to care for the mentally ill persons unable to act in their best interest); Grant H. Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFF. L. REV. 651, 652 (1968) (a person may become so mentally ill that society requires his confinement for purposes of treatment); Hawkins & Sullivan, *supra* note 281, at 616-17.

285 BLACK'S LAW DICTIONARY 1156 (6th ed. 1990).

286 *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71 (1992).

general welfare within constitutional limits and is an essential attribute of government."[287]

a. *Requirements of* Addington v. Texas[288]*—Proof of Mental Illness and Dangerousness*

i. *The Dangerousness Requirement*

States cannot use unfettered discretion in the exercise of their police powers. Pursuant to the mandates of *Addington v. Texas*,[289] the state must prove that an individual is dangerous to himself and others by a standard greater than the preponderance of the evidence in order to commit him in civil proceedings. Pending criminal charges do not establish dangerousness,[290] and similar to all other civil commitments, the Equal Protection Clause requires a judicial proceeding to determine the dangerous propensities of a person nearing the expiration of a prison term.[291] Modern sexually violent predator laws require a finding of dangerousness.[292] The Supreme Court once recognized that "past behavior may not be an adequate predictor of future actions. Predictions of future behavior are complicated further by the difficulties inherent in diagnosis of mental illness."[293] A subsequent finding that a person committed a criminal act beyond a reasonable doubt, however, indicates a propensity toward dangerous behavior.[294] Sexual predator laws, therefore, adequately satisfy the due process dangerousness requirement.

ii. *The Mental Illness Requirement*

In addition to the dangerousness requirement, *Addington v. Texas*[295] mandates proof of mental illness in order to involuntarily commit an individual.[296] Specifically, the *Addington* Court noted that "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[297] The Supreme Court does not

287 BLACK'S LAW DICTIONARY 1156-57 (6th ed. 1990) (citations omitted).
288 441 U.S. 418 (1979).
289 *Id.*
290 *See* Jackson v. Indiana, 406 U.S. 715, 728 (1972).
291 *See* Baxstrom v. Herold, 383 U.S. 107, 111 (1966).
292 *See supra* note 3.
293 Heller v. Doe, 509 U.S. 312, 323-24 (1993).
294 *See* Jones v. United States, 463 U.S. 354, 364 (1983); *see also* Lynch v. Overholser, 369 U.S. 705, 714 (1962) (finding that the commission of a criminal act constitutes "strong evidence" of dangerousness).
295 441 U.S. 418 (1979).
296 *See id.* at 426-27.
297 *Id.* at 426.

attempt to define mental illness.[298] The Court only requires a showing "that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior"[299] and defers to legislative definitions of mental disease.[300] In fact, in *United States v. Salerno*,[301] the Court specifically interpreted *Addington* as permitting detention of "mentally unstable individuals who present a danger to the public."[302] Apparently, the *Salerno* Court would permit mental instability to fulfill the mental illness prong and would not require more.

On the other hand, consistent with its prior holdings, the Court in *Foucha v. Louisiana*[303] refused to allow the state to commit an individual under a statute that disregarded the mental competence of the person committed. The *Foucha* Court criticized the state's attempt to hold indefinitely an individual with an antisocial personality that leads to aggressive behavior—a disorder for which no effective treatment exists.[304] The Court expressed its concern that if it upheld the statute, the state, by implication, might be entitled to confine convicted criminals who complete their prison terms based on a personality disorder that leads to criminal conduct.[305] The Court distinguished mental illness and personality disorder, but only in the context of Foucha's individual case. The challenged statute in *Foucha* allowed release of the insanity acquittee if and only if he proved to the court that he no longer presented a danger to himself or others.[306] The statute contained no component concerning mental illness or personality disorder, and, therefore, authorized the state to commit individuals based on dangerousness alone.

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298 *See id.*

299 *Id.* at 427.

300 *See* Jones v. United States, 463 U.S. 365, 364 n.13 (1983)

> "[T]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment". . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Id. (citations omitted).

301 481 U.S. 739 (1987).

302 *Id.* at 748-49.

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance, through . . . sexual psychopath laws, . . . reflects . . . [a] . . . distinct [basis] for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972).

303 504 U.S. 71 (1992).

304 *See id.* at 78.

305 *See id.* at 82-83.

306 *See id.* at 73.

In contrast to the statute at issue in *Foucha*, release under sexually violent predator laws relies upon whether "the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence."[307] The statutes contemplate both mental competence and dangerousness, and states, therefore, confine sexually violent predators on more than dangerousness alone.[308] In *Foucha*, whether the insanity acquittee continued to be mentally ill or plagued by a personality disorder was irrelevant, because the statute paid no heed to the inmate's mental health. Consequently, *Foucha* does not summarily invalidate modern sexually violent predator laws, because these laws consider the existence of both a mental disorder and dangerousness.[309]

Although civil commitment statutes must contain a mental illness component, lower courts disagree as to whether the requirements of sexually violent predator statutes adequately fulfill this criteria. In *State v. Post*,[310] the dissent highlighted a legitimate concern surrounding the state's ability to define mental illness. "Were there no limit on a state's substantive power to commit individuals, a state could civilly commit whole categories of criminal offenders such as intoxicated drivers merely by branding them deviant and designating them mentally disordered."[311] The dissent argued that

> [t]he *Foucha* case teaches that states are not free to define any deviancy they please as a mental illness and thereby commit to mental hospitals anyone who might fit their definition. . . . The *Foucha* Court underscored this point in holding that an insanity acquittee with a diagnosed antisocial personality disorder could not be confined as mentally ill.[312]

The dissent, however, misconstrued the actual holding of *Foucha*.[313] The *Foucha* Court decided only that a Louisiana law which allowed the continued confinement of insanity acquittees based on dangerousness alone violated the substantive component of the Due Process Clause.[314] In addition, the *Foucha* Court specifically noted that "keeping Foucha against his will in a mental institution is improper *absent a determination in civil commitment proceedings of current mental illness and*

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307 WASH. REV. CODE § 71.090.90 (1992).

308 Whether the predatory acts of sexual violence defines the personality disorder is not the topic of this Note and will not be addressed. However, the issue certainly may contribute to determining the constitutionality of these laws.

309 Clear and convincing evidence of mental illness refers to evidence that a person is mentally ill only within the specific definition of the statute. *See* Reome v. Levine, 692 F. Supp. 1046, 1050 (D. Minn. 1988).

310 541 N.W.2d 115 (Wisc. 1995).

311 *Id.* at 142.

312 *Id.* (citations omitted).

313 *See supra* Part II.A.1.e (discussing *Foucha* holding).

314 *See* Foucha v. Louisiana, 504 U.S. 71, 85 (1992).

dangerousness."[315] It follows, therefore, that the Court would permit the insanity acquittee's detainment if the state followed appropriate civil commitment procedures.

The *Foucha* holding warns legislators to draft civil commitment statutes which include a mental illness prong, but it does not add substance to what constitutes a sufficient definition of mental illness. Because the Court in *Allen v. Illinois*[316] dealt specifically with a sexually violent predator statute, its analysis deserves careful attention when attempting to define the parameters of the mental illness requirement for civil commitment. The *Allen* Court, in declaring the statute civil in nature, explicitly stated that because "the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."[317] Based on the language used by the Court, in addition to Illinois's requirement of proof of the existence of a mental disorder, the Court implicitly defined mental disorder as a subset of the larger class of mental illness.[318] Based on this reading and without further analysis, the Illinois Sexually Dangerous Persons Act, promulgated pursuant to the state's police power to protect the community from the dangerous tendencies of some who are mentally ill,[319] does not violate the substantive component of the Due Process Clause.[320] Likewise, modern sexually violent predator statutes, which require personality disorder or mental abnormality, may fit within this categorical framework, and thus do not violate constitutional guarantees of due process.[321]

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315 *Id.* at 78 (emphasis added).

316 478 U.S. 364 (1986).

317 *Id.* at 370.

318 *See also* Wisconsin v. Post, 541 N.W.2d 115, 143 (Wisc. 1995) (Abrahamson, J., dissenting) ("mental illness 'may be a subset of that larger group of disorders known as mental disorder'") (quoting psychologist Dr. Nood, who testified at trial) (alteration in original).

319 *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

320 U.S. CONST. amend. XIV, § 1.

321 The clinical significance of personality disorder and mental abnormality extends logically from this discussion. The Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) lists personality disorder as a mental illness, and possibly suffices to sustain the mental illness requirement for involuntary commitment. *See* Brooks, *supra* note 10, at 722. *But see* La Fond, *supra* note 4, at 761. Difficulty arises in asserting the significance of mental abnormality. Professor Brooks defines mental abnormality as "a legal term, intended to convey a form of pathology that leads to violent sexual offenses." Brooks, *supra* note 10, at 730. Brooks refers to the professional opinion of Dr. Gene Abel of Emory University Medical School, who commented that sex offenders' "compulsive, repetitive, driven behavior, which at times has no rational, logical reward, appears to fit the criteria of an emotional or psychological illness." *Id.* at 730 (*quoting* GENE G. ABEL & JOANNE L. ROULEAU, *Male Sex Offenders, in* HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS 271 (Michael E. Thase et al. eds., 1990)). Justifying the absence of mental abnormality from the DSM-III-R, Professor Brooks refers to the manual as an "evolving and imperfect document." *Id.* at 733. Brooks hypothesizes that "the leaders of the psychiatric profession seem to be unwilling to accept

Similarly, Chief Justice Burger's concurring opinion in *O'Connor v. Donaldson*,[322] a civil commitment case, expressly affirmed the state's authority to confine individuals solely to protect society from "the dangers of significant antisocial acts."[323] Burger specifically categorized Minnesota's psychopathic personality statute which targets sexual offenders as one passed pursuant to the state's police powers, but he did not require that the statute specifically define mental illness.[324]

Legislators and judges certainly encounter difficulties when attempting to attach legal definitions to mental illness, and employing resources outside of the legal domain does not satisfactorily facilitate the task. The professional psychiatric community, likewise, encounters difficulty when dealing with appropriate classifications of sexual deviants. One author offers a useful definition of sex offenders as

> "individuals who are ultimately convicted for committing overt acts for their immediate sexual gratification that are contrary to the prevailing sexual mores of their society and thus are legally punishable. Such individuals are distinguished from sexually deviant individuals

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sexual misbehaviors such as rape as a diagnosis for fear that such a diagnosis could be used to establish a psychiatric excuse for escaping punishment." *Id.* at 732. Conversely, the Washington State Psychiatric Association invalidated any psychiatric basis for the terms personality disorder or mental abnormality. *See* Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995) (citing Amicus Brief, Washington State Psychiatric Association, at 7). Clearly, sharp disagreement exists as to the validity of the terms employed and their meanings as legal and clinical evaluations intersect. For a detailed explanation of the psychiatric diagnosis, *see* Hammel, *supra* note 218, at 803-04.

322 422 U.S. 563 (1975).

323 *Id.* at 582-83. Justice Burger cited Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940), to lend support to his proposition. In *Pearson*, the Court upheld Minnesota's psychopathic personality statute as not unconstitutionally vague and not violative of equal protection or procedural due process. The statute defined psychopathic personality as

> "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

Minnesota *ex. rel.* Pearson, 309 U.S. 270, 272 (quoting 1939 MINN. LAWS chap. 369 § 1). This law mirrors the modern sexually violent predator laws.

324 Justice Burger's reference to *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), in his discussion of constitutionally permissible delegations of the State's police power sheds light on the substantive due process issue. One commentator noted that a court "will reach what is essentially a substantive due process conclusion by striking down a state commitment scheme as vague and overly broad." La Fond, *supra* note 284, at 516-17 (footnotes omitted). Would La Fond argue the Court essentially reached a substantive due process conclusion when it determined Minnesota's psychopathic personality statute, 1939 MINN. LAWS chap. 369, § 1, not unconstitutionally vague? *See* Minnesota *ex rel.* Pearson, 309 U.S. 270 (1940).

> who commit the same acts but have never been adjudicated in connection with their behavior."[325]

In the treatment of sexual offenders, many experts define rapists as mentally ill individuals, while others define rape as a purely criminal act.[326] Similar to the current lack of an agreed upon definition in the legal community, an adequate psychiatric categorization of the sexual offender remains elusive.

b. *Government's Regulatory Interest in Community Safety*[327]

Difficulties in determining whether sexually violent predators are mentally ill may be disregarded if the permissibility of their commitment can be defined outside of the limitations prescribed in *Foucha v. Louisiana*.[328] Although limited, the state's use of its police power extends beyond situations in which potential civil committees are found to be both mentally ill and dangerous. In *United States v. Salerno*,[329] the Supreme Court declared that the Due Process Clause does not create an impenetrable wall that "no governmental interest—rational, important, compelling, or otherwise—may surmount."[330] The *Salerno* Court listed situations in which the Court previously approved of various detention schemes,[331] but it failed to define any limitations on, or possible sources of, the state's power. The Court conceded that a general rule of substantive due process prohibits the government from detaining a person prior to a judgment of gmlt in a criminal trial, but it quickly highlighted the number of exceptions to this rule that Congress created and the Court upheld.[332]

The *Salerno* Court employed the strict scrutiny test in order to uphold the Bail Reform Act. *Salerno*'s majority found the government's interest in preventing crime by arrestees legitimate and compelling and the Bail Reform Act narrowly focused "on a particularly acute problem in which the Government interests are overwhelming."[333] The Court next recognized an individual's strong interest in liberty as a fundamental right.[334] Finally, the Court noted the long history of cases holding that an individual's liberty interest "may, in circumstances where the government's interest is sufficiently weighty,

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325 SCHWARTZ & CELLINI, *supra* note 14, at 2-2.
326 *See id.*
327 United States v. Salerno, 481 U.S. 739, 748 (1987).
328 504 U.S. 71 (1992).
329 *Salerno*, 481 U.S. 739.
330 *Id.* at 748 (citations omitted).
331 *See id.* at 748-49.
332 *See id.* at 749.
333 *Id.* at 750.
334 *See id.*

be subordinated to the greater needs of society."[335] Without more, the court upheld the Bail Reform Act on due process grounds.[336]

Some courts have analyzed the sexually violent predator statutes in a similar manner.[337] The *Salerno* decision authorizes states to legitimately deprive individuals of constitutionally protected rights in certain situations, provided those situations withstand strict scrutiny. If sexually violent predator laws withstand strict scrutiny, then the laws should be upheld. The involuntary commitment of sexual predators involves a compelling state interest, and the statutes arguably are narrowly focused, both procedurally and in relation to the class of persons they effect. In *State v. Post*,[338] the Supreme Court of Wisconsin recognized "the state's compelling interest in protecting society . . . through the commitment and treatment of those identified as most likely" to commit acts of sexual violence.[339]

In *Post*, the Wisconsin Supreme Court applied the strict scrutiny test and defined the dual interests of the state—protecting the community from dangerous mentally disordered individuals and providing care and treatment to those individuals predisposed to sexual violence.[340] The court referred to the Supreme Court's recognition of the legitimacy of these interests under both the state's police powers and *parens patriae* powers.[341] The Wisconsin Supreme Court emphasized the important distinction between statutory definitions of mental illness and mental disorder which serve a legal function and clinical definitions of these terms which serve a medical function.[342] The court warned of the "significant risk of misunderstanding when descriptions designed for clinical use are transplanted into the forensic setting."[343]

Although the Wisconsin Supreme Court conceded the potential indefiniteness of the predator inmate's confinement, it concluded that the purposes of commitment reasonably related to the duration.[344] Because an individual's commitment ends when the individual no longer suffers from a mental disorder, treatment of the mental

335 *Id.* at 750-51.

336 The Court's willingness to uphold the Act stemmed, in part, from the procedural safeguards instituted in detaining arrestees. Most criticism of involuntary commitment schemes in case law focuses on the state's failure to afford adequate procedural due process. La Fond, *supra* note 284, at 506.

337 *See, e.g.*, State v. Post, 541 N.W.2d 115 (Wisc. 1995).

338 *Id.*

339 *Id.* at 118.

340 *See id.* at 122.

341 *See id.* (citing Addington v. Texas, 441 U.S. 418, 425 (1979)).

342 *See id.* at 123 (citing the warning of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)).

343 *Id.*

344 *See id.* at 127.

condition, then, links directly to duration.[345] The court concluded that "[p]rotection of the community is also well-served by [the] statutory scheme because the danger to the public has necessarily dissipated when treatment has progressed sufficiently to warrant an individual's release."[346]

The dissent found no rational basis for civil commitment under the challenged statute.[347] Instead, the dissent underscored the need for a more reliable definition of mental illness, although it conceded that the Supreme Court never attempted to establish an exact definition.[348] The dissent implicitly argued that the civil commitment scheme only withstands strict scrutiny if the statute requires both mental illness and dangerousness.[349] The dissent noted that if "mental illness or a 'mental condition component' means whatever a state claims it means, a constitutionally required threshold for deprivation of liberty would be transformed into a meaningless standard signifying whatever state legislatures want it to signify."[350] The dissent highlighted the inconsistencies currently confronting courts ruling on substantive due process challenges to the involuntary commitment of sexually violent predators. These inconsistencies result from deficient guidance but do not demand the conclusion that the commitment scheme violates due process.[351]

Although Supreme Court precedent insufficiently guides the lower courts in determining the adequacy of mental illness components, the Court in *Foucha v. Louisiana*[352] found a statute devoid of a mental illness component unconstitutional. In *Foucha*,[353] the Supreme Court attempted to distinguish the confinement of insanity acquittees under the Louisiana scheme from the pretrial detention authorized by the Bail Reform Act which was upheld in *United States v. Salerno*.[354] In *Salerno*, "the duration of confinement under the Act was strictly limited" and the government carried the burden of demonstrating with clear and convincing evidence that the "arrestee presents an identified and articulable threat to an individual or the commu-

345 *See id.*
346 *Id.*
347 *See id.* at 142 (Abrahamson, J., dissenting).
348 *See id.*
349 *See id.*
350 *Id.* at 143.
351 The dissent concluded that the majority opinion relied on a circular definition of mental disorder premised on dangerousness which detains individuals considered dangerous regardless of whether they have a mental illness. *See id.* at 143-44. Other courts criticize this circular reasoning in determining sexually violent predator laws unconstitutional because they lack a mental illness component. *See* Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).
352 504 U.S. 71 (1992).
353 *Id.*
354 481 U.S. 739 (1987).

nity."[355] Conversely, Louisiana's statute required the detainee to prove that he was not dangerous without regard to his mental stability.[356] The Court found the *Foucha* scheme not carefully limited, although it did not expand on this conclusion or state how legislatures could more narrowly draft the statute.

In declaring the Louisiana scheme unconstitutional, the *Foucha* Court noted that "in *Salerno* . . . the detention . . . found constitutionally permissible was strictly limited in duration" by the Speedy Trial Act.[357] Although the *Foucha* Court disapproved of the indefiniteness of the Louisiana statute, this dissatisfaction apparently resulted from *both* its indefiniteness and lack of a mental illness requirement.[358] *Foucha*[359] stands solely for the proposition that a state may not indefinitely hold an insanity acquittee who has been cured of his mental illness but is still a danger to himself and others. The *Foucha* majority, however, expressly affirmed "the holding of [the Court's] cases that a convicted criminal may not be held as a mentally ill person without following the requirements for civil commitment, which would not permit further detention based on dangerousness alone."[360]

The *Foucha* Court noted the unconstitutionality of commitment based on either dangerousness or mental illness.[361] In its analysis, the Court compared Louisiana's commitment statute with the standard upheld in *Salerno* in which the Court required compelling state interests and a narrowly tailored scheme. As Justice Thomas pointed out in his dissenting opinion, the *Foucha* Court "never explain[ed] if we are dealing here with a fundamental right, . . . [and] never disclose[d] what standard of review applies."[362] Justice Thomas noted that the

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355 *Id.* at 751.

356 The Court consistently criticized the State's scheme for seeking "to perpetuate Foucha's confinement . . . on the basis of his antisocial personality." Foucha v. Louisiana, 504 U.S. 71, 78 (1992). The flaw in this line of reasoning surfaces upon a closer inspection of the statute which disregarded the committees mental condition and required only proof of dangerousness. The Court relied on the findings of the two-member sanity commission that Foucha "evidenced no signs of psychosis or neurosis and was in 'good shape' mentally. . . . [H]e had, however, an antisocial personality, a condition that is not a mental disease and that is untreatable." *Id.* at 75.

357 *Id.* at 82 (citing United States v. Salerno, 481 U.S. 739, 747 (1987)).

358 This assumption extends logically from the holding in *Addington v. Texas*, 441 U.S. 418 (1979), which permitted the indefinite commitment of an individual both mentally ill and dangerous.

359 504 U.S. 71 (1992).

360 *Id.* at 83 n.6. The majority referred to this line of cases in order to rebut the rationale of the dissent. In doing so, however, the Court further described the criteria necessary to involuntarily detain an individual in a civil commitment proceeding: something more than dangerousness alone. Again, the Court did not define additional requirements, although the unidentified element appears to be the presence of a mental illness, mental abnormality, or personality disorder.

361 *See* Foucha v. Louisiana, 504 U.S. 71, 75 (1992).

362 *Id.* at 116 (Thomas, J., dissenting).

Court "appears to advocate a heightened standard [of review] heretofore unknown in our case law."[363]

A statute that satisfies *Foucha*'s requirements will withstand strict scrutiny, but defining constitutionally permissible civil commitment statutes as those that contain both mental illness and dangerousness components may be underinclusive. Another category may exist under which the Supreme Court will categorize sexually violent predator statutes, similar to the analysis of the Minnesota Supreme Court in *In re Blodgett.* In *In re Blodgett*,[364] the Supreme Court of Minnesota defined the state's psychopathic personality statute as a subset of *Foucha*'s mentally ill and dangerous category, or alternatively, an additional category. The court defined the psychopathic personality as "an identifiable and documentable violent sexually deviant condition or disorder."[365] Beyond these conclusions, the court did not explain the mental illness requirement, and consequently created an additional category of legitimate civil commitment based on proof of a deviant disorder and dangerousness.

The Supreme Court may uphold civil commitment schemes based on the state's regulatory interest in community safety, but it may be unnecessary to classify sexually violent predator statutes under this framework. Instead, the acts possibly fall within the state's authority to detain dangerous persons through constitutionally permissible civil commitment proceedings pursuant to its police powers.

3. *The Significance of Treatment*

Although the Washington legislature found sexually violent predators unamenable to existing psychiatric treatment modalities, it nevertheless found "the treatment needs of this population very long

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363 *Id.* at 117. Justice Thomas noted that the majority invalidated the statute because it violated "some general substantive due process right to 'freedom from bodily restraint' that triggers strict scrutiny." *Id.* Thomas considered this analysis dangerously wrong. *See id.* In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the Court noted that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." This analysis seems to allow the civil commitment of an individual found to have a mental abnormality who engaged in sexual predatory acts. Commitment laws, of course, seek to protect the public, as well as treat the individuals committed. Similarly, in *O'Connor v. Donaldson*, 422 U.S. 563, 574 (1975), the Court determined that a State must have "a constitutionally adequate purpose for the confinement." According to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the State legitimately enacts laws for the protection of public health, safety, morals, and welfare. This authority must be exercised to further legitimate public interests through means rationally related to that end. When such state action infringes upon fundamental liberties, the interests sought must be compelling and the means pursued must be narrowly tailored. *See* La Fond, *supra* note 284, at 501 n.7; Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

364 510 N.W.2d 910 (Minn. 1994).

365 *Id.* at 915.

term, and the treatment modalities for this population very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act."[366] In 1975, in *O'Connor v. Donaldson*,[367] the Supreme Court declined the opportunity "to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the state."[368] However, four years later in *Addington v. Texas*,[369] the Court specifically required the extension of care to civil committees detained pursuant to the State's *parens patriae* powers, while only requiring protection of the community when the state detains dangerous mentally ill individuals.[370] If appropriately categorized under the state's police powers, the sexually violent predator statutes do not have to include a treatment component. They must, however, be premised upon a finding of mental illness, a legal term still undefined by the Supreme Court.[371]

Because the Supreme Court in *Allen v. Illinois*[372] defined Illinois's Sexually Violent Predator Act in terms of the state's *parens patriae* power, other predator statutes should be analyzed in a similar manner. Determining the state's legitimate interest in treating sexual offenders,[373] the *Allen* majority legitimized Illinois's civil commitment scheme under the state's *parens patriae* power.[374] Under this analysis,

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366 WASH. REV. CODE § 71.09.010 (1992).

367 422 U.S. 563 (1975).

368 *Id.* at 573.

369 441 U.S. 418 (1979).

370 *See id.* at 426. *But see* Beth Keiko Fijimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 888 (1992) ("The constitutionally permissible purpose of police power involuntarily civil commitment is to treat the individual's mental illness and to protect the person and society from the person's potential dangerousness.").

371 Again, the question arises as to exactly how the Court defines mental illness. Because the Court continuously uses mental illness, mental disorder, and like terms interchangeably, satisfactory fulfillment of the mental illness prong which meet constitutional requirements remain unclear. *See supra* Part III.2.a.ii.

372 478 U.S. 364 (1986).

373 Sexual offender treatment remains a very primitive area. *See* Wright, *supra* note 270, at 62. One therapist, Kay Jackson, believes the therapeutic relationship offered through therapy changes people in the long run. *See id.* However, among the twenty therapists at the Adult Diagnostic and Treatment Center in Avenel, New Jersey, one of the largest facilities in the world devoted exclusively to the treatment of sex offenders, no consensus exists on what programs successfully treat sexual offenders. *See id.*

374 In his Comment, Andrew Hammel refers to the *Allen* Court's emphasis on the importance of providing treatment for the mentally ill. *See* Hammel, *supra* note 218, at 800. Hammel interprets this emphasis as "central to the determination of whether the statutory scheme is considered truly civil." *Id.* at 801. Thus, "treatment . . . designed to effect recovery" must be provided by the state if and only if it is acting pursuant to its *parens patriae* power. In *Allen*, the Court was not persuaded that the state was acting in accordance with this power, because the Petitioner did not demonstrate, nor did the record suggest, that conditions of confinement of sexually dangerous persons in Illinois were "incompatible with the State's asserted interest in treatment." *Allen*, 478 U.S. at 373.

committed individuals need only have an emotional disorder. The State does not need to meet the mental illness standard required for the commitment of individuals pursuant to its police powers. Thus, so long as the state treats sexual offenders while incapacitated, it legitimately uses its power to commit emotionally disordered individuals.[375] Washington's statute, similar to the statutes in the fifteen other jurisdictions which have sexual predator laws,[376] requires both care and treatment.[377]

B. The Constitutionality of Modern Sexually Violent Predator Laws—Substantive Due Process Limitations

Based on Supreme Court precedent, modern sexually violent predator laws ultimately should be upheld by the Court on substantive due process grounds. However, the Supreme Court conceivably will be prompted to more carefully delineate the limitations on the state's authority to incapacitate individuals. Specifically, because lower courts express concern about precise definitions of mental illness, the Court may guide the lower courts, as well as state legislatures, by providing a satisfactory definition of the mental illness prong required in *Foucha v. Louisiana*.[378]

Initially, the Court must decide under what authority the state derives its power to involuntarily commit sexual predators. If the state acts legitimately through its *parens patriae* power, then treatment must be the primary concern.[379] However, if the state acts pursuant to its police powers, then the existence of a mental illness must be

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375 Many articles do not differentiate the state's police power from its *parens patriae* power. *See* Brooks, *supra* note 10, at 715. Although no specific Supreme Court case stands for the proposition that involuntary civil commitment of mentally disordered and dangerous individuals is constitutional, a history of unchallenged precedent certainly exists.

376 Minnesota's psychopathic personality statute requires treatment, an issue explored in *In re Blodgett*. 510 N.W.2d 910 (Minn. 1994). The court conceded that the treatment requirement is problematic, but also stated that "it is not clear that treatment for the psychopathic personality never works." *Id.* at 916. The court ultimately concluded that so long as the civil commitment scheme seeks to provide both treatment and periodic review, due process is not violated.

377 WASH. REV. CODE § 71.09.080 (1992).

378 504 U.S. 71 (1992).

379 State courts inconsistently define the mental status of sexually violent predators. For instance, in *In re Young*, 857 P.2d 989 (Wash. 1993) *habeas corpus granted sub nom.* Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995) (en banc), the court noted "at the outset that there are good reasons to treat mentally ill people differently than violent sex offenders." *Id.* at 1010. It then referred to a case in which the Illinois Supreme Court concluded that "[a] sexually dangerous person 'creates different societal problems, and his past conduct is different in degree and kind from the conduct of persons in the larger, more inclusive class defined under the Mental Health Code." *Id.* (quoting People v. Pembrock, 62 Ill.2d 317, 322 (1976)). The Washington Supreme Court nonetheless determined that the sexually violent predator statute satisfied the mental illness requirement. *See In re* Young, 857 P.2d at 1001.

proved and treatment concerns disappear. Alternatively, the Supreme Court may decide that these civil commitment schemes fall under a third category, defined in *Foucha* as "certain narrow circumstances, [in which] persons who pose a danger to others or to the community may be subject to limited confinement."[380] The Supreme Court may also uphold sexually violent predator laws as constitutional based on the government's well-established authority to subordinate an individual's liberty interest to the greater needs of society based, again, on the state's police power.[381]

The Supreme Court will certainly face a difficult challenge if it attempts to more carefully define mental illness[382] in the context of the state's police power.[383] "There are as many definitions of the term 'sex offender' as there are individuals doing the defining. . . . Every state uses the label differently according to its legislative statutes."[384] If the Court continues to use mental illness interchangeably with other psychiatric terms indicating some abnormality, then the civil commitment schemes articulated in the sexually violent predator laws certainly could withstand constitutional scrutiny. However, as specifically found by the Washington Task Force, individuals affected by the Sexual Predator Act do not necessarily suffer from classic mental ill-

380 *Foucha*, 504 U.S. at 80. The Supreme Court probably would not consider sexual predator laws to fall within this category, specifically because sexual predator laws are potentially indefinite, and this category requires limited confinement. Similarly, the Court probably would not determine that the procedural safeguards written into the sexual predator laws create a limited term of confinement analogous to the Speedy Trial Act which, in *United States v. Salerno*, 481 U.S. 739 (1987), the Court found to be a sufficient guarantee of limited confinement. However, the Court referred to the Speedy Trial Act in the context of its conclusion that "the incidents of pretrial detention [are not] excessive in relation to the regulatory goal Congress sought to achieve." *Id.* at 747. The reference to length of detention related to the determination of the nature of the act as punitive or regulatory is an inquiry not addressed in this analysis. In fact, the *Salerno* Court concluded that the Due Process Clause does not "prohibit[ ] pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." *Id.* at 748.

381 *Salerno*, 481 U.S. at 748-52.

382 One commentator suggests that a diagnosis that may subject an individual to confinement should at least be reasonably well defined and accepted in the psychiatric community. *See* Hammel, *supra* note 218, at 802. The author proposes that "[t]he condition should be treatable, and it should be the cause of the dangerous conduct for which one is being incarcerated." *Id.*

383 In *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995), the district court ruled the Washington Sexually Violent Predator Statute to be unconstitutional because of the absence of the mental illness requirement, apparent both in the statutory language and legislative history. *See id.* at 749-50. The court relied on the Amicus Brief submitted by the Washington State Psychiatric Association as well as the *Diagnostic and Statistical Manual*, in order to conclude that the Washington legislature intended to capture more than the seriously mentally ill by employing a term unrecoguized in the psychiatric community. *See id.* at 750 n.2.

384 SCHWARTZ & CELLINI, *supra* note 14, at 2-2.

ness.[385] The Washington State legislature admittedly passed the Sexual Predator Act in order to detain violent sexual predators who did not fall under the restrictive definition of the previously existing commitment law.[386] Although one commentator stated that courts define mental illness as "a condition manifested by significant cognitive, emotional, or behavioral impairments which ought to have legal significance,"[387] the Supreme Court has never defined the term in such specific language.

The difficulty in determining the constitutionality of modern sexual predator laws results, in part, from the Court's inadequately defined limitations on the state's power to involuntarily commit individuals. As early as 1972, the Court became aware of the need to resolve the issues embodied in sexually violent predator statutes.[388] However, "[g]uideposts for responsible decisionmaking in this uncharted area of substantive due process [remain] scarce and open-ended."[389] Based on precedent as well as the specific language found in Supreme Court opinions, the Court may conceivably uphold sexual predator laws against a substantive due process challenge. However, it seems more likely that the Court will simultaneously choose to limit the power of the state to involuntarily commit individuals pursuant to civil proceedings.[390]

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385 *See* Young v. Weston, 898 F. Supp. 744, 750 & n.3 (noting the testimony of one member of the Task Force describing Earl Shriner as clearly a problem and clearly very dangerous, but not suffering from a classic mental illness).

386 *See* WASH. REV. CODE § 71.09.010 (1992). The district court which recently ruled Washington's law unconstitutional compared the original involuntary commitment statute's use of medically recognized terms against the challenged statute's deliberate use of medically valueless terms. The legislature recognized the existing involuntary treatment act as a "short-term civil commitment system . . . primarily designed to provide short-term treatment." *Id.* In contrast, appropriate treatment for sexually violent predators is long term, and the legislature found the existing commitment act inappropriate for this group, possibly based on their treatment needs and defining characteristics. *See id.*

387 La Fond, *supra* note 284, at 509. This conclusion resulted from an equal protection analysis of classifications based on mental illness. La Fond predicted that "courts will probably find mental illness to be a relevant personal characteristic for distinguishing among persons in order to achieve legitimate state objectives." *Id.* Dismissing equal protection challenges, La Fond did not define mental illness with any more precision than the Court.

388 *See* Jackson v. Indiana, 406 U.S. 715, 737 (1972) ("Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the States broad power to commit persons found to be mentally ill] have not been more frequently litigated.") (footnote omitted).

389 Pettco Enter. v. White, 896 F. Supp. 1137, 1147 (M.D. Ala. 1995), *aff'd without op.*, Pettco Enter. v. White, 98 F.3d 1353 (11th Cir. 1996) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

390 The Court may uphold sexual predator laws as a legitimate use of the State's power to incapacitate individuals who pose a danger to society and simultaneously need treatment for an existing disorder. The Court may question the State's motives in a commitment scheme authorizing treatment subsequent to completion of a penal term that provides no treatment. Although *Baxstrom v. Herold*, 383 U.S. 107 (1966), authorized the States to involuntarily commit individuals subsequent to a completed penal term for both

Based on the Court's own analysis in *Allen v. Illinois*,[391] the state's authority to involuntarily commit sexual predators derives from its *parens patriae* authority and is supplemented by its concerns with protecting the welfare and safety of other citizens. Unfortunately, when applied to sexual predators, this analysis breaks down, because this power legitimates itself only when used to detain a class of citizens incapable of caring for themselves. In addition, under the *parens patriae* guise, the state's primary motive involves treatment and care for that class. More conceivably, the state acts pursuant to its police powers *primarily* to protect society from a class of dangerous, mentally disturbed individuals and, to a lesser degree, to provide treatment.[392]

CONCLUSION

Based on a careful reading of Supreme Court precedent concerning the involuntary commitment of individuals in civil proceedings, modern sexually violent predator laws should survive a substantive due process challenge. The Court may redefine limitations on the state's authority to involuntarily commit individuals who pose a danger to society, and it may also be concerned with the logical, albeit theoretical, extensions of the state's power to detain dangerous persons.[393] But because modern sexually violent predator laws provide adequate procedural protection and pursue compelling state objectives with narrowly-tailored means, the Court may be willing to uphold these laws on this ground alone. However, more conceivably, the Court will define the state's authority under its police powers, *parens patriae* powers, or some hybrid framework through which the state provides treatment and incapacitates sexual predators for the protection of society.

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confinement *and* care, Baxstrom served his criminal sentence in an institution under the jurisdiction and control of the New York Department of Correction used to confine and care for mentally ill patients. *See id.* at 108. This situation differs dramatically from modern sexually violent predator laws in which treatment is only sought subsequent to the completion of the penal term, an aspect which calls into question the state's interest in rehabilitation as opposed to retribution.

391 478 U.S. 364 (1986).

392 *See* WASH. REV. CODE § 71.09.010 (1992) (treatment of sexually violent predators is long term and the prognosis for curing offenders is poor).

393 *See* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 276-77 (1940):

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with . . . a psychopathic personality . . . , and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

The Supreme Court once inadequately defined the state's police powers as "incapable of any very exact definition or limitation."[394] The Court must now determine a more exact definition or limitation, or, at the very least, determine whether the sixteen states that have adopted sexually violent predator laws modeled after Washington's legislation exceeded the scope of their power and unconstitutionally deprived a class of offenders of its constitutionally guaranteed liberty. Although the state may attempt to protect the public from persons considered extremely dangerous, it can not do so at the expense of the constitutionally guaranteed liberties of that dangerous population. The question facing the Court involves the extent to which the state can protect the innocent where the penal system proves insufficient.[395] Based on the explicit words of the Supreme Court, the answer remains that these states acted pursuant to and within the scope of their power, but the Court will now answer this question on its own.

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394 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872). The Court determined that the "security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life" depend on the state's police power. *Id.*

395 How can criminal or civil laws adequately deal with sexually violent predators? The case of Donald Chapman serves as another example of the overwhelming danger these offenders pose to society. Chapman asked permission to remain at the Diagnostic and Treatment center, but the State lacked the legal authority to keep him in prison absent another crime committed. *See* Wright, *supra* note 270, at 59. In the opinion of three psychiatrists, "Chapman was not psychotic, which is to say that he was not suffering from hallucinations or thought disorders; therefore, he was not 'mentally ill' in the legal sense and they could find no justification for locking him away in an institution." *Id.* Although he "'represent[ed] a clear and present danger to others, because of his sexualized rage, deep-seated feelings of low self-esteem and resentment and fears of others,'" Chapman was released from confinement. *Id.* He now remains committed in a psychiatric hospital until the New Jersey Supreme Court hears his appeal concerning the provision in Megan's Law (New Jersey's sexual psychopath statute) that redefines mental illness in order to facilitate civil commitment of potentially dangerous sex offenders. *See id.* at 68.